

## Chapter 9

# THE ILC'S ARTICLES ON STATE RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS AND RELATED TEXTS

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On 31 May 2001 the ILC adopted the 59 articles of its draft on 'Responsibility of States for Internationally Wrongful Acts' on second reading.<sup>1</sup> This was the provisional success of an intellectual epic that started in the time between the World Wars, the subject already being on the agenda at the Codification Conference of the League of Nations in 1930. However, the issue at that time was too sensitive, the opposition between States, especially between European and Latin American countries, too strong, so that the endeavour failed (see Chapter 7). The ILC nevertheless included the topic of State responsibility in the initial list, adopted at its first session in 1949, of 14 subjects for codification. But it was not until 1955 that the ILC made its Cuban member, García Amador, Special Rapporteur for the topic.

The ILC only superficially examined the six reports presented by García Amador between 1956 and 1961. It did so under the pretext of being occupied with the codification of other areas of international law,<sup>2</sup> a polite representation of a more complex reality. The Special Rapporteur limited his study to 'Responsibility of the State for injuries caused

<sup>1</sup> Report of the ILC, 53rd Session, *ILC Yearbook 2001*, Vol II(2), 26–143; see also J Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge, CUP, 2002).

<sup>2</sup> *ILC Yearbook 1969*, Vol II, 229 (para 67).

in its territory to the person or property of aliens'<sup>3</sup> and therefore trapped himself in the problems that had caused the failure of the original League of Nations project, making success unlikely (see Chapter 8). Reaffirmed as a priority by the General Assembly and the ILC itself in the early 1960s, the project was nevertheless started afresh in 1963 after García Amador had ceased to be a member of the ILC; however, a very different angle was taken. This new angle was outlined by a Sub-Committee under Ago's chairmanship; Ago became the new Special Rapporteur for the topic that same year, and gave it a decisive momentum as of 1969.

Under his influence and that of his successors, Riphagen and Gaetano Arangio Ruiz, the draft was adopted on first reading in 1996, and the second reading was completed in 2001 thanks to the energy and pragmatism of Crawford, fifth and last Special Rapporteur on the topic. During his tenure as Special Rapporteur, Ago defined some aspects that, from his point of view should be detached, even though they undoubtedly constituted part of the topic, in particular responsibility without breach (see Chapter 10) and diplomatic protection (see Chapter 73). The responsibility of international organizations has been the subject of a different study that has resulted in the adoption by the ILC of draft Articles on that topic on first reading in 2009 (see Chapters 22, 66).

## 1 The Articles on State Responsibility for Internationally Wrongful Acts

### (a) The 'Ago revolution'

Ago distanced himself from the approach taken by García Amador in the debates of 1963<sup>4</sup> that preceded his appointment as Special Rapporteur, as well as in his note of 1967<sup>5</sup> and in his First (and late!) Report of 1969.<sup>6</sup> This is hardly surprising: García Amador's approach had been the subject of fierce criticism, and even though his proposals were limited to reflecting the 'positive' law created by arbitration case law of the late 19th and early 20th century—or rather because of this—the proposals were not well received by the representatives of Third World countries as well as Eastern European States, particularly at the Sixth Commission of the General Assembly. Distancing himself from this debate was Ago's first stroke of genius.

It is not easy to determine when exactly the myth of 'secondary norms' was created. The idea is that abstract 'consequential' rules must be rigorously followed and that these secondary norms determine the consequence of the breach of a substantive ('primary') rule. It turned into a veritable *credo* at the ILC. It is clear however that the idea was already contained in the first statements by Ago, even though, back in 1963, 1967, or 1969 it did not in any way refer to the famous distinction by Hart<sup>7</sup> and kept to a simpler idea that is undoubtedly sufficient. It was expressed in his First Report as follows: 'the Commission should, with a view to the codification of the topic, give priority to the definition of

<sup>3</sup> See FV García-Amador, First Report on State Responsibility, *ILC Yearbook 1956*, Vol II, 173, 221; FV García-Amador, Second Report on State Responsibility, *ILC Yearbook 1957*, Vol II, 104.

<sup>4</sup> *ILC Yearbook 1963*, Vol II, 227 (Report by R Ago, Chairman of the Sub-Committee on State Responsibility, A/CN.4/152).

<sup>5</sup> *ILC Yearbook 1967*, Vol II, 325.

<sup>6</sup> *ILC Yearbook 1969*, Vol II, 125, esp 133–141.

<sup>7</sup> HLA Hart, *The Concept of Law* (Oxford, Clarendon Press, 1961), 77; cf 2nd edn, 1994, 79.

the *general* rules governing the international responsibility of States.<sup>8</sup> This approach was already retained by the famous course which the very young Italian professor had given at The Hague Academy of International Law in 1939<sup>9</sup> and which constituted the manifesto for what can without exaggeration be called the 'Ago revolution'. This idea he defended from 1963 to 1980, when he left the Commission for good; it can thus clearly be attributed to Ago himself and not, as it is often suggested, to his capable and talented assistants, especially Marina Spinedi. Even though their support should not be underestimated, Ago indisputably remained the designer of the draft.

In the introduction to his Hague course, which is key to his ideas on the topic he has so much influenced, Ago states that one should note that the existing studies of international delicts all start from the viewpoint of responsibility, that is, the viewpoint of the consequences of the delict rather than its characteristics or constitutive elements.<sup>10</sup> True, there is some terminological hesitation; in the same sentence Ago concedes something to the very idea he challenges, since he likens responsibility to its consequences, and seems to exclude the generating act (the delict or rather the internationally wrongful act). This hesitation can also be found in his first reports.<sup>11</sup> But the essential point is there: responsibility should not be reduced to its consequences, especially not just to the consequences of the obligation to make reparation.

It is on this point that the 'revolution' occurred. It was expressed in the famous first article, adopted in 1973, and was confirmed in 1980 through the adoption of the first part of the draft; it was kept unchanged in the final version of the whole draft that was adopted at its first reading in 1996, then at the second reading in 2001: 'Every internationally wrongful act of a State entails the international responsibility of that State.' This is a conceptual revolution: injury (ie material or moral damage), which was the centre of the traditional analysis by García Amador, has been dropped as the generator of responsibility.

This approach benefits from near unanimous approval in academic writing (a regrettable exception are some of the French internationalists, especially Jean Combacau, Gilles Cottereau, and Emmanuel Decaux).<sup>12</sup> No ILC member has questioned it and none of the States that submitted observations on the adopted draft to the Secretariat at the first reading opposed it,<sup>13</sup> except for Argentina and France who felt it had to draw up a complete counter-draft that reintroduced injury ('*dommage*') as the generator of responsibility.<sup>14</sup> In spite of this attack, Crawford, fifth and last Special Rapporteur for the topic, took a firm stance against reintroducing damage as an 'autonomous condition' for an internationally

<sup>8</sup> Emphasis added, *ILC Yearbook 1969*, Vol II, 139 (para 90).

<sup>9</sup> R Ago, 'Le délit international' (1939-II) 68 *Recueil des cours* 415. <sup>10</sup> *Ibid.*, 420.

<sup>11</sup> Cf A Pellet, 'Remarques sur une révolution inachevée. Le projet de la CDI sur la responsabilité des États' (1996) 42 *AFDI* 7, 11–13.

<sup>12</sup> J Combacau & S Sur, *Droit international public* (Paris, Montchrestien, 2004), 519; G Cottereau, 'Systèmes juridiques et notion de responsabilité' in SFDI, *La responsabilité dans le système international* (Paris, Pedone, 1991), 21; or E Decaux, 'Responsabilité et réparation', *ibid.*, 147. For a much more nuanced view see P Reuter, 'Le dommage comme condition de la responsabilité internationale', in *Estudios de Derecho Internacional—Homenaje al Profesor Miaja de la Muela* (Madrid, Tecnos, 1979), reproduced in P Reuter, *Le développement de l'ordre juridique international—Écrits de droit international* (Paris, Economica, 1995), 561–571, esp 569–571.

<sup>13</sup> See 'Comments and observations received from Governments', A/CN.4/488, Add.1, Add.2 and Add.3; A/CN.4/492.

<sup>14</sup> 'Comments and observations received from Governments', A/CN.4/488, esp 22 and 31–32.

wrongful act,<sup>15</sup> and the ILC fortunately did not question what must surely be regarded as a fundamental progress, if not for international law itself, at least for the idea that we have of it.

Throughout this approach to State responsibility there remains the idea that international law is not a network of inter-subjective norms dedicated above all to the protection of particular State interests, but a *system*<sup>16</sup> that guarantees the coexistence of States in their common interest. There is more than one nuance of this: it could be said that this analysis reflects an excessively optimistic vision of international society, but, unlike its precursor, which was exclusively sovereigntist, it does take into account the emergence of communitarianism on the international level, however modest this development may be. This approach is based on the observation that, however fundamental the breached rule may be and however serious the breach is, it is possible that no damage is caused to any particular State (for example where genocide is committed by a State against a part of its population, as happened in Rwanda). Crawford's Third Report (in 2000) endeavoured to clarify (and in some sense went beyond) the notion of 'victim' and article 40 of the 1996 draft.<sup>17</sup> This justifies the fact that certain violations of the law are so serious that they threaten the interest of not just one or several victim States (if any there be), but the international community as a whole, whose members should be able to draw certain consequences. Thus, on proposal by the Special Rapporteur, the Commission introduced the famous distinction between crimes and delicts, a distinction that was confirmed in draft article 19 on first reading.<sup>18</sup>

In any case, it is undeniable that Ago's intuition freed the draft from the deadlock caused by the strategic clumsiness of García Amador (rather than a weakness that was mistakenly attributed to his reports). Thanks to the 'secondary' and general approach, the opposition by the most sceptical States (and among the members of the ILC) was overcome and the study of the subject could continue on a more promising basis.

Admittedly, it continued very slowly. This can probably be explained by the multiple occupations of the Special Rapporteur who was involved with the *Barcelona Traction* case before the International Court of Justice. Even though the general concept as defended by Ago had been approved by the Commission in 1963,<sup>19</sup> it was not until 1969 that he wrote his first report<sup>20</sup> and not until 1971 that he proposed his first draft articles.<sup>21</sup>

This slow maturation also had benefits, it probably explains the theoretical rigour of the first part of the draft which, by using as a starting point the breach of obligation ('*manquement*') (rather than the injury as in García Amador's draft), draws very rigorous conclusions, even though, from time to time, an article may denote some inconsistency.

<sup>15</sup> J Crawford, First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(1), 1, 28–29 (paras 112–117).

<sup>16</sup> Cf J Combacau, 'Le droit international, bric à brac ou système?' (1986) 31 *Archives de philosophie du droit* 85.

<sup>17</sup> See art 48 of ARSIWA.

<sup>18</sup> In the words of art 19(2) of the 1996 draft: 'An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.' Draft art 19(4) stated: 'Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.'

<sup>19</sup> *ILC Yearbook 1963*, Vol II, 227.

<sup>20</sup> R Ago, First Report on State Responsibility, *ILC Yearbook 1969*, Vol II, 125.

<sup>21</sup> R Ago, Third Report on State Responsibility, *ILC Yearbook 1971*, Vol II(1), 199.

### (b) Adoption of the draft at the first reading

In 1969, the ILC, after having discussed Ago's First Report (a historical account of the work completed until then<sup>22</sup>), took several decisions that would definitively orientate its approach.

First, it limited its study to State responsibility, excluding other areas of the international law of responsibility such as responsibility of international organizations and of individuals (but the latter topic was at the same time dealt with in the draft Code of Crimes against Peace and Security of Mankind, adopted on second reading in 1996).<sup>23</sup>

Second, it excluded 'liability for risk arising out of the performance of certain lawful activities, such as spatial and nuclear activities': this topic was nevertheless put on the ILC's agenda in 1978 under the rather esoteric title of 'International liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law'; it resulted in two drafts adopted in 2001 and 2006, titled 'Prevention of Transboundary Harm from Hazardous Activities'<sup>24</sup> and 'Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities'<sup>25</sup> respectively.

Finally, on this basis the ILC adopted the outline of its study; as explained in Ago's 1975 Report (more clearly than in the 1969 Report), the first part of the draft:

will be concerned with the origin of international responsibility and the second with the content, forms and degrees of international responsibility. Once these two essential tasks are completed, the Commission may, if it seems fit, decide to add a third part to the draft, in which to consider certain problems concerning settlement of disputes and what has been term the 'implementation' (*mise en oeuvre*) of the international responsibility of the State.<sup>26</sup>

Thus the ILC adopted between 1973 and 1981 the 35 articles of the first part of the draft on the basis of seven consecutive reports by Ago.<sup>27</sup> They were structured in five chapters according to a rigorous and logical plan: *I. General Principles; II. The 'act' of State according to international law; III Breach of an international obligation; IV Implication of a State in the internationally wrongful act of another State; V Circumstances precluding wrongfulness*, Ago's title for Part 1 as a whole was 'The Origin of Responsibility'. Incidentally, the heading of the first Part was not without ambiguity and seemed to show that, as if scared by their own audacity, the Special Rapporteur and the Commission had not dared to follow their logic to the end, while the second Part, entitled 'Content, forms and degrees of international responsibility' dealt in reality with the consequences of responsibility, which is engaged as soon as the conditions mentioned in article 1 and set out in detail in article 2 (originally draft article 3) are met. This is actually the true 'content' of international responsibility. The 2001 Articles do not any more take the plunge; the first part is titled 'The internationally wrongful act of a State' (which is not very meaningful but not erroneous; however the term 'Engagement of responsibility' would have been more appropriate). The content of the old second part content was split into two new parts, one again titled 'Content of the International Responsibility of a State' and the other 'Implementation'.

<sup>22</sup> R Ago, First Report on State Responsibility, *ILC Yearbook 1969*, Vol II, 125.

<sup>23</sup> Draft Code of Crimes Against the Peace and Security of Mankind, *ILC Yearbook 1996*, Vol II(2), 15.

<sup>24</sup> See Report of the ILC, 53rd Session, *ILC Yearbook 2001*, Vol II(2), 146–170.

<sup>25</sup> See Report of the ILC, 58th Session, 2006, A/61/10, 106–182). See Chapter 10.

<sup>26</sup> *ILC Yearbook 1975*, Vol II, 56 (para 41).

<sup>27</sup> See A Pellet, 'Les Rapports de Roberto Ago à la CDI sur la responsabilité des États' (2002) 4 *Forum du droit international* 222.



A fourth and last part is dedicated to 'General Provisions'. The third part of the first draft 'Settlement of disputes' was discarded at the second reading.

Apart from this reservation, which is only of doctrinal importance, it must be stressed with how much skill Ago managed to convince his colleagues of his ideas—all the more so considering that his ideas were not self-evident, that the members of the Commission were mostly great jurists with strong personalities and convictions, and also considering that this occurred in the middle of the Cold War. Thus, as much as the draft is conceptually revolutionary, it is at the same time practically and technically conservative, apart from the part concerned with crime. It is true that it was probably not easy to escape the Special Rapporteur's persuasiveness; the approach he defended 'rubbed out' political and ideological oppositions, at least as to Part One. No doubt this is why the draft articles presented by Ago were little modified by the Commission despite the very long discussions they generated.

One of the characteristics of Ago's Part One is certainly the impressive meticulousness of the articles and their commentaries. Undoubtedly one could have concerns over some details, for example over distinctions that may be too subtle to be operational, between different categories of violated obligations.<sup>28</sup> The same could be said for the legal institutions that feature in chapter V, 'Circumstances precluding wrongfulness', such as consent or *force majeure*, which do not necessarily fall under this rubric. The fact remains however that all this, especially the commentaries, were and still are very useful for practitioners of international law, a fact that has certainly been mitigated by the conciseness of the commentaries finally adopted in 2001.

After he left the Commission in 1978 (or rather in 1980, since he presented his Eighth Report to the Commission in 1979 and 1980 even though he had been elected to the Court in 1978<sup>29</sup>), Ago could not lead to its end the work of progressive development and codification of State responsibility, even in the limited way it had been circumvented. His election prevented—or spared?—him from guiding the ILC on consequences of responsibility and its implementation (Parts Two and Three) which, more than Part One would certainly unleash political opposition.

It is not an insult to observe that the seven reports presented between 1980 and 1986 by the third Special Rapporteur, Riphagen (who was nominated in 1979) constitute a parenthesis. Strongly constructed and extremely theoretical, his work is above all difficult, and its excessive abstraction seemed to have discouraged the other members of the Commission, who sent 21 of his proposed articles to the Drafting Committee but only provisionally adopted<sup>30</sup> the first five articles of Part Two before Riphagen left the ILC in 1986.

The appointment of a new Special Rapporteur, the Italian professor Gaetano Arangio-Ruiz, resulted not only in a change of style. The fourth Special Rapporteur belonged to an old school of thought as far as the concept of international responsibility itself was concerned, even though he sometimes claimed Ago's heritage (to which Riphagen had closely adhered).<sup>31</sup> From then on, it was all the more likely that he would make an effort to

<sup>28</sup> Cf draft arts 20–28 as adopted on first reading—esp arts 20 and 21—reflect Ago's special concept of the distinction between obligations of result on the one hand and obligations of conduct on the other.

<sup>29</sup> Cf *ILC Yearbook 1979*, Vol I, 3 (1531st meeting (15 May 1979)); and *ILC Yearbook 1980*, Vol I, 153 (paras 34–35) (1612th meeting (16 June 1980)).

<sup>30</sup> *ILC Yearbook 1986*, Vol II(2), 38.

<sup>31</sup> See the approval that he gave at the SFDI colloquium of Le Mans in 1990 to the inorganic approach of responsibility, put forward by several participants: *La responsabilité dans le système international* (Paris, Pedone, 1991), 317.

deeply influence the ILC's work; though he paid lip service to his immediate predecessor, he did not hide his intention to start afresh and take up the task of starting the study for the second and third parts *ab initio*.<sup>32</sup>

In truth, the fourth Special Rapporteur was more a moralist (in the respectable sense) than a doctrinalist. While Ago knew how to construct a coherent system of responsibility, Arangio-Ruiz was above all inspired to moralize international law, and this deeply influenced his approach.

The emphasis Arangio-Ruiz placed on grand utopian principles (on which he insisted in particular during the discussion of Part Three concerning the settlement of disputes) resulted in a certain indifference to other, more technical aspects of the draft. As a consequence, the provisions of Part Two of the 1996 text, and especially the second chapter concerning the rights of the injured State and reparation, are sometimes very short, not to say cryptic.

The Special Rapporteur's moralism led him to a belated but enthusiastic dedication to the idea of international crimes of States even though he had initially been suspicious towards it, in accordance with his inorganic conception of international society. Nevertheless, in his First Report, Arangio-Ruiz did not challenge the distinction between crime and delict in principle; he considered the study of the consequences of the latter premature,<sup>33</sup> which is not without paradox. Whatever one may think of the concept of State crime, one thing is certain: such a notion is unconceivable unless one adheres to a 'communitarian' or social idea of the law on responsibility. The distinction between crimes and delicts is not an inexorable consequence of the idea that responsibility arises from an internationally wrongful act, but on the other hand it is inconceivable if the triggering factor of responsibility is the injury or the damage and not the failure to act or prevent.

In other words, if there is such a thing as State crime, this can only arise because the breached rule is of a different character than the rule whose violation constitutes a simple delict. One could consider this as due to the fact that the rule in question is a peremptory norm. It could be thought that, as draft article 19 on first reading set out, the violation concerns an obligation that should be respected in the interest of the international community as a whole, which is approximately the same idea. What is certain is that the notion of crime is wholly incompatible with an inorganic conception of responsibility, or more generally, of international law, to which Arangio-Ruiz strongly adheres.

Nevertheless, the Special Rapporteur's dedication to crime reflected a coherence that was at least ideological, if not doctrinal, the aim being to moralize international life and international law. As with *jus cogens*, the notion of crime can contribute to this, which was in the end recognized by Arangio-Ruiz. However, he did not approach the issue until his Fifth Report.<sup>34</sup> Previously he had studied the consequences of international crimes and delicts in an undifferentiated way—the same method was employed by Crawford in his first three reports. An excessive inflation of the consequences of delicts was the result, while the consequences that are particular to crimes have been reduced to a shadow. Thus, draft article 45 on first reading, devoted to satisfaction, envisaged the possibility of punitive damages in the case of simple delicts, however, they could only conceivably be justified for crimes.

<sup>32</sup> See G Arangio-Ruiz, Preliminary Report on State Responsibility, *ILC Yearbook 1988*, Vol II(1), 5, 7–8 (para 8).

<sup>33</sup> *Ibid*, 8 (paras 10–18).

<sup>34</sup> G Arangio-Ruiz, Fifth Report on State Responsibility, *ILC Yearbook 1993*, Vol II(1), 1, 30ff.

Conversely, the specific consequences that the draft drew from State crimes were limited and full of deficiencies: draft articles 51 to 53 were concerned with the issue and did not foresee any specific legal regime of countermeasures. One of the most important effects of the commission of a crime—the transparency of the State (the fact that the responsibility of its leaders can be pursued, notwithstanding the immunities they would otherwise enjoy)—is not mentioned at all (it was once again silenced in the 2001 Articles).

But it is in Part Three of the draft on first reading, concerned with the settlement of disputes, that Special Rapporteur Arangio-Ruiz's rather utopian moralism became most evident. This established an obligatory conciliation mechanism for all disputes concerning the application of the draft, and an obligation to resort to arbitration for all disputes arising from the implementation of countermeasures. As a result, virtually all international disputes could become justiciable, since there are hardly any that cannot come down to issues of responsibility. It would therefore suffice that one State took countermeasures, however arbitrary they might be, to push the victim towards arbitration. One of the perversities of the system was that the resort to countermeasures was further encouraged.

Arangio-Ruiz also showed a certain 'angelic idealism' in this regard. He was always hostile towards this form of 'private justice' (which is nevertheless logical in an inorganic system<sup>35</sup>), stressing that countermeasures are the privilege of the strongest [State];<sup>36</sup> however, at the same time his draft articles on the subject were, at least in their initial formulation, very libertarian and contained almost no safeguards against abuse.<sup>37</sup> The Special Rapporteur in effect blindly trusted the obligatory arbitration mechanism that he sought to establish, and it is only because of a last minute amendment proposed by Mohamed Bennouna<sup>38</sup> that a true limitation was established in form of the requirement for preliminary negotiations under draft article 48. Unfortunately, all this was improvisation; and the obligation to negotiate was accompanied, in the same draft article, by the recognition of the lawfulness of provisional or conservatory measures that the draft did not even define or *a fortiori* regulate. In any case, it was evidently unacceptable to limit the arbitrariness of resort to countermeasures by reference to a dispute settlement mechanism knowing that this mechanism would be completely unacceptable for the great majority of States.

Under these conditions it is not surprising that the draft articles concerning countermeasures were among the most controversial during the discussions in the Sixth Committee in 1996 and 1997, as well as in the observations addressed to the Secretariat, along with the (closely linked) provisions for the settlement of disputes and of course also the provisions concerning crimes.<sup>39</sup>

The obligatory resort to arbitration in the case of dispute related to the use of countermeasures, provided for in draft article 58(2) on first reading, only seemingly offered protection. Apart from the fact that this was very clearly unacceptable to States,<sup>40</sup> it did

<sup>35</sup> D Alland, *Justice privée et ordre juridique international* (Paris, Pedone, 1994), 503.

<sup>36</sup> See in particular G Arangio-Ruiz, Third Report on State Responsibility, *ILC Yearbook 1991*, Vol II(1), 1, 7 (para 4).

<sup>37</sup> See eg draft art 12: G Arangio-Ruiz, Fourth Report on State Responsibility, *ILC Yearbook 1992*, Vol II(1), 1, 22.

<sup>38</sup> See the discussions in the 2454th, 2455th and 2456th meetings (5, 9 and 10 July 1996), *ILC Yearbook 1996*, Vol I, 151ff.

<sup>39</sup> See 'Comments and observations received from Governments', A/CN.4/488, 123, especially the comments of Ireland (129), the United Kingdom (132), Czech Republic (134), and the United States (128).

<sup>40</sup> See 'Comments and observations received from Governments', A/CN.4/488, 142–146 and A/CN.4/488/Add.1, 9.



not take into account the general context in which countermeasures are taken: the interests of the victim State (the State which has committed the alleged breach) will in many cases have been irrevocably affected when waiting for the judgment or award. Everything indicates that the victim State would prefer to surrender rather than submit itself to a lengthy arbitral procedure with an outcome all the more uncertain, given that the substantive rules in the draft that determine the legality of countermeasures are rather lax.

In a more general way, Part Three of the 1996 draft, drawn up in haste, reflected the endearing but unrealistic idealism of the Special Rapporteur. Considering that he was entirely occupied with the articulation of countermeasures and the settlement of disputes, it is curious that he never officially presented general draft articles on the latter.<sup>41</sup> However, Part Three in itself could not convince, if only because it aimed at (or in any case resulted in) a profound change to the present system of international law that allows States to settle their disputes by peaceful means of their choice. It may be asked whether 34 independent experts, lacking a specific mandate, would have strayed beyond their role of codification and *progressive* development of international law in proposing to introduce such fundamental changes to the international legal order.

Besides, the mere existence of Part Three of the first reading text, at least as it was planned, was debatable. Dispositions on implementation would of course have been useful; they could above all have dealt with the mechanism of diplomatic protection which undoubtedly belongs to the subject of responsibility. But this was not the case for the settlement of disputes, which could have been added to any and all ILC texts. This has not been the practice; the ILC has rightly treated these kinds of provisions as a matter for the purely political appreciation of States. These considerations caused the ILC simply to drop Part Three of the 1996 draft when finally adopting the Articles in 2001.

### (c) The definitive adoption of the Articles in 2001

Arangio-Ruiz resigned as Special Rapporteur just before the adoption of the first reading draft in 1996. His membership of the ILC not having been renewed, James Crawford was nominated Special Rapporteur for the subject in 1997. Even though he was an Australian professor teaching in Cambridge and (unlike all his predecessors) educated in the common law system, he still endorsed Ago's approach and the whole of Chapter One of Part One on first reading. This was so even though the draft was replete with Roman law as well as deriving from continental doctrinal discussions in which Anglo Saxon lawyers had not really taken part.

The method that the fifth Special Rapporteur on State responsibility adopted to conclude a definitive text was however marked by Anglo Saxon pragmatism. Unlike his predecessors, he did not start from any doctrinal, ideological, or moral presupposition. He had been given the mandate of completing a final, generally acceptable draft by 2001 (the duration of the mandate of the members of the ILC). He successfully went to work, sometimes feeling his way, never hesitant to contradict himself, he made an effort to gain the largest possible support for every controversial provision. He patiently defused criticisms, but unlike Arangio-Ruiz he always listened attentively and accepted them if they did not seem to disturb the general equilibrium of the draft. Even though the influence of ILC Special Rapporteurs on their drafts is always important, Crawford's influence was clearly crucial.

<sup>41</sup> See G Arangio-Ruiz, Fifth Report on State Responsibility, *ILC Yearbook 1993*, Vol II(1), 1, 7, 28.

To assist him in his task, the Special Rapporteur found support in several successive working groups. He presented four reports between 1998 and 2001 in light of observations by governments. The first group, constituted in 1997, concentrated on the method that should be used to complete the work on the subject in the following four years.<sup>42</sup> The 2001 working group, with an open composition, discussed the most controversial questions of the 1996 draft: the notion of State international crime, countermeasures, settlement of disputes and the form of the definitive text.<sup>43</sup> In the same year, the ILC created a working group of 11 members that was charged with reviewing the commentaries to the draft articles that had been prepared by the Special Rapporteur.

The Commentaries that were finally adopted are reproduced in the report of the Commission on its 53rd Session.<sup>44</sup> They are invaluable to determine the meaning of the provisions that are necessarily concise and often complex but nevertheless integral to the Articles. The 2001 Commentaries are more complete and enlightening than those that were added to the articles of the Parts Two and Three on first reading. On the other hand, the Commentaries on Part One are not equal to those written by Ago between 1973 and 1980, which remain an unrivalled model.

The same is true for the articles themselves: ceding to some criticisms by governments and pressed for time, the Commission completed the text with some of the articles ending up slightly short (especially as far as forms of reparation are concerned). It simplified and pruned, sometimes excessively, the articles contained in Part One, reducing the number from 35 to 27. Some deletions were without any consequences, but others are more questionable. This is the case with the simplification of the old draft articles 18 and 24–26, which became new articles 13–15 concerning the occurrence and duration of the breach. The new provisions are admittedly simpler and easier to comprehend, but they do not provide such a complete answer to the questions in this area. On the other hand, it should be noted with how much care the ILC revised the draft articles dealing with circumstances precluding wrongfulness (articles 20–27); these commend themselves for their conciseness and clarity.<sup>45</sup>

Unlike the other articles of Part One, the rest of the draft clearly benefited from the re-examination that the ILC undertook following observations by States and under Crawford's vigorous impetus. The structure of the draft was reviewed and rationalized. The articles concerning reparation were taken up again and completed in a more rigorous way. Furthermore, the ILC changed its view on the implementation (*'mise en oeuvre'*) of State responsibility: instead of focusing on the obligations of the responsible State, it emphasized the invocation of the State's responsibility by other States.

It is one of Crawford's great achievements that he suggested a new approach which takes as a starting point not the abstract and controversial definition of the injured State,<sup>46</sup> but the various situations in which responsibility may be invoked.<sup>47</sup> This can be done by the

<sup>42</sup> Report of the ILC, 49th Session, *ILC Yearbook 1997*, Vol II(2), 58 (paras 158–161).

<sup>43</sup> Report of the ILC, 53rd Session, *ILC Yearbook 2001*, Vol II(2), 21 (paras 43–44).

<sup>44</sup> *Ibid.*, 26–143; see also J Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge, CUP, 2002).

<sup>45</sup> For a more detailed comparison of the two drafts, see A Pellet, 'Les Articles de la CDI sur la responsabilité de l'État pour fait internationalement illicite; Suite—et fin?' (2002) 50 *AFDI* 1.

<sup>46</sup> Especially in the case of crime; according to this theory article 40(3) of the draft of the first reading states that 'injured state' means . . . any other State', which is hardly satisfying, as Arangio-Ruiz pointed out: G Arangio-Ruiz, Third Report on State Responsibility, *ILC Yearbook 1991*, Vol II(1), 27.

<sup>47</sup> See especially J Crawford, Third Report on State Responsibility, 2000, A/CN.4/507, paras 97–118; and 373–375 and J Crawford, Fourth Report on State Responsibility, 2001, A/CN.4/517, paras 27–42.

injured State or, less frequently, by a State other than the injured State, especially when the obligation that has been breached is owed to the international community as a whole, in particular the grave violation of an obligation arising from a peremptory norm of general international law.<sup>48</sup>

This slightly cumbersome expression is the discreet equivalent of the word 'crime' as it was used in the first reading draft; its penal connotation resulted in resistance from several States<sup>49</sup> and criticism from some academic commentators;<sup>50</sup> it was therefore replaced by a definition. This circumvention originates in the third report of the Special Rapporteur where he considers the question 'whether further consequences can be attached to the category of gross, egregious or systematic breaches of obligations to the international community as a whole'.<sup>51</sup> He answered this question in the affirmative, considering that 'leaving to one side the controversial terminology of crimes, [the consequences drawn from crimes by articles 52 and 53 of the draft adopted at the first reading] are broadly acceptable . . .'.<sup>52</sup> This was a partial and covert conversion on his part to the concept of crime, the word excepted.

At first, the Special Rapporteur had shown strong hostility towards the concept of crime as used in the 1996 draft, on the (mistaken) pretext that it was aiming to establish the criminal responsibility of States. He sought to neutralize it by not excluding the existence of criminal State responsibility from the draft, and at the same time suggesting that it should be the subject of a different codification project.<sup>53</sup> This would inevitably have buried the problem.<sup>54</sup> On this basis, the drafting Committee adopted in 2000, in a preliminary form, draft articles 41 and 42, that form Chapter III of Part Two on the 'Content of International Responsibility of a State' and substituted for the old draft articles 51 and 53 of the 1996 draft.<sup>55</sup> However, the distinction between two degrees of unlawfulness was abandoned in the first part of the 2001 articles. This is logical since the responsibility of the State is engaged regardless of the character of the obligation (article 12 of the 2001 articles). The evolution of the Special Rapporteur's position on this point has saved the notion of crime, albeit not the term itself.<sup>56</sup>

Nevertheless, the consequences that the Draft Articles on second reading draw from these serious breaches are deceptive, and they are no more explicit than the 1996 articles

<sup>48</sup> Cf art 48 'Invocation of responsibility by a State other than an injured State'.

<sup>49</sup> See 'Comments and observations received from Governments' A/CN.4/488 and Add.1 to 3, and Crawford's summary in his First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(1), 1, 11–14 (paras 52–54).

<sup>50</sup> See especially R Rosenstock, 'An international Criminal Responsibility of States?', in A Pellet (ed), *Le droit international à l'aube du XXIème siècle—Réflexions de codificateurs / International Law on the Eve of the Twenty-First Century* (New York, United Nations, 1997), 276–284; or J Barboza, 'State Crimes: A Decaffeinated Coffee', in L Boisson de Chazournes and V Gowlland-Debbas (eds), *L'ordre juridique international, un système en quête d'équité et d'universalité—Liber Amicorum Georges Abi-Saab* (The Hague, Nijhoff, 2001), 358–359.

<sup>51</sup> J Crawford, Third Report on State Responsibility, 2000, A/CN.4/507, para 407.

<sup>52</sup> *Ibid.*, para 410.

<sup>53</sup> J Crawford, First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(1), 1, 23 (para 94).

<sup>54</sup> See the lively debates at the Commission on this point *ILC Yearbook 1998*, Vol I, 87–158 (2532nd to 2540th meetings (19 May–3 June 1998)), and the summary in the Report of the ILC, 50th Session, *ILC Yearbook 1998*, Vol II(2), 70ff (paras 283–331).

<sup>55</sup> *ILC Yearbook 2000*, Vol II(2), 69; the articles of the preliminary draft became, in a slightly modified form, arts 40 and 41 of the definitive draft.

<sup>56</sup> See A Pellet, 'Le nouveau projet de la CDI sur la responsabilité de l'État pour fait internationalement illicite: Requiem pour le crime?', in LC Vohrah et al (eds) *Man's Inhumanity to Man—Festschrift Antonio Cassese* (The Hague, Kluwer, 2002), 654–681, or in English (2001) 32 *NYBIL* 55.

with regard to countermeasures (but see the important saving clause in article 54, a sanitized version of the more definite draft proposed by the Special Rapporteur and adopted by the Drafting Committee in 2000).<sup>57</sup>

The simplest solution to avoid these problems would have been to exclude the regulation of countermeasures entirely; this was advocated by France. But since the Articles intended to cover all consequences of the internationally wrongful act, such an omission would have seriously unbalanced the final text. Moreover, paraphrasing the words of the International Court of Justice on intervention, countermeasures are only a 'manifestation of a policy of force, such as has, in the past, given rise to most serious abuses', especially if, in theory, all States can have recourse to it, 'from the nature of things, it would be reserved for the most powerful States'.<sup>58</sup> A refusal to regulate the exercise of countermeasures would have been equivalent to covering up abuse; there is nothing that disadvantages the weak more than the absence of law. The articles that deal with countermeasures (articles 49 to 53) generally deal with the issue in an adequate way, even though they may have given rise to some fierce debates.<sup>59</sup>

#### (d) The form of the articles

By resolution 56/83 of 12 December 2001, adopted without a vote, the General Assembly took note of the Articles on Responsibility of States for Internationally Wrongful Acts, presented by the ILC, the text of which it annexed to the resolution, and recommended them to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action<sup>60</sup> which could be adopted in 2004.<sup>61</sup> By doing this it responded to the ILC's wishes. The ILC had recommended annexing the draft to the resolution (by employing article 23(b) of the ILC Statute, Resolution 174(II) of the General Assembly), and had asked the General Assembly to consider 'at a later stage, and 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'.<sup>62</sup>

This was a compromise, its first proposal corresponded to the wish of the Special Rapporteur Crawford,<sup>63</sup> the second corresponded to article 23(c) or (d) of the Statute of the Commission, and to the position of the majority of ILC members who mistakenly believed that the success of an ILC draft could only be measured by a treaty law yardstick and that there could be no salvation without a treaty.

By resolution 59/35, the General Assembly again adjourned its definitive decision on the final form of the Articles to the 62nd Session of the General Assembly in 2007, and then by resolution 62/61, it again adjourned it to the 65th Session in 2010. Generally, the States that commented showed reservations towards the appropriateness of a convention.<sup>64</sup> It should nevertheless be noted that only a very small number of States (mainly Western, with the exception of France) made the effort to respond to the request of the Secretary-General. As the United Kingdom excellently put it:

<sup>57</sup> *ILC Yearbook 2000*, Vol II(2), 70.      <sup>58</sup> *Corfu Channel, Merits, ICJ Reports 1949*, p 4, 35.

<sup>59</sup> *ILC Yearbook 2000*, Vol I, 257–341 (2645th to 2654th meetings (25 July to 10 August 2000)).

<sup>60</sup> GA Res. 56/83, 12 December 2001, (para 3).

<sup>61</sup> *Ibid* (para 4).

<sup>62</sup> Report of the ILC, 53rd Session, *ILC Yearbook 2001*, Vol II(2), 25 (paras 72–73).

<sup>63</sup> Cf J Crawford, *International Law Commission's Articles on State Responsibility* (Cambridge, CUP, 2002),

58–59.

<sup>64</sup> 'Comments and information received from governments', A/62/63 (9 March 2007) and Add.1 (12 June 2007).



It is difficult to see what would be gained by the adoption of a convention. Resolution 56/83 provided the draft articles with a firmer standing than if the draft articles had not been annexed, and resolution 59/35 enhanced this standing. The draft articles are already proving their worth and are entering the fabric of international law through State practice, decisions of courts and tribunals and writings. They are referred to consistently in the work of foreign ministries and other Government departments. The impact of the draft articles on international law will only increase with time, as is demonstrated by the growing number of references to the draft articles in recent years. This achievement should not be put at risk lightly [ . . . ] Our view remains that any move at this point towards the crystallization of the draft articles in a treaty text would raise a significant risk of undermining the currently held broad consensus on the scope and content of the draft articles. . . .

If few States were to ratify a convention, that instrument would have less legal force than the draft articles as they now stand, and may stifle the development of the law in an area traditionally characterized by State practice and case law. In fact, there is a significant risk that a convention with a small number of participants may have a de-codifying effect, may serve to undermine the current status of the draft articles and may be a 'limping' convention, with little or no practical effect.<sup>65</sup>

It is a fact that the influence of ILC texts is not dependent on the conclusion of a convention; this has already been shown by the influence of the Articles on State responsibility. In addition, the 'Compilation of decisions of international courts, tribunals and other bodies' which refers to the ILC Articles on State Responsibility and was carried out by the Secretary-General by applying resolution 59/35 of the 2nd December 2004, contains no less than 129 cases in which the Articles (or the draft on first reading) and the commentaries are cited.<sup>66</sup> There is therefore hardly any doubt that a convention would pose a strong risk to the 'fragile balance contained in the articles', the result of a long maturation period and delicate compromises.<sup>67</sup>

## 2 The extension of the Articles on Responsibility—Diplomatic Protection and Responsibility of International Organizations

In the same way that the Vienna Convention of 1969 did not mark the end of the ILC's work on the law of treaties,<sup>68</sup> the codification and progressive development of the law on international responsibility did not come to an end with the adoption of the 2001 Articles. Apart from the issue of 'liability',<sup>69</sup> the work has been extended in the Draft Articles on Diplomatic Protection, adopted on second reading in 2006, and also in the work in progress of the draft on Responsibility of International Organizations, adopted on first reading in 2009.

<sup>65</sup> A/62/63, 6 (paras 6–8), see also the comments of Norway on behalf of the Nordic countries at 3 (para 4) and the United States Add.1, 2 (para 4).

<sup>66</sup> See A/62/62 and Add.1; see also the decisions of tribunals and national courts communicated to the Secretary-General A/62/63 and Add.1.

<sup>67</sup> Comment by Norway (on behalf of the Nordic Countries), A/62/63, 4 (para 4).

<sup>68</sup> See especially the Vienna Convention on Succession of States in respect of Treaties, 23 August 1978, 1946 UNTS 3, and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, 25 ILM 543, the 1978 Draft articles on Most-Favoured-Nation Clauses and the work in progress on the reservations to treaties and the effect of armed conflicts on treaties.

<sup>69</sup> See Chapters 10, 34, 35.

## (a) The Draft Articles on Diplomatic Protection (2006)

The most traditional way of implementing State responsibility is without doubt diplomatic protection. However, the Articles on State Responsibility are nearly silent on this matter (with the exception of article 44). It seems that Ago had this in mind when writing his first reports;<sup>70</sup> it would have its place in Part Three which he anticipated to be on the implementation of responsibility, rather than the settlement of disputes, which is not specific to the law of State responsibility. Diplomatic protection is actually a form of implementation since it is a mechanism through which a State espouses the cause of one of its nationals injured by an internationally wrongful act committed by another subject of international law. The idea was not on the cards, neither Riphagen or Arangio-Ruiz took it up and it was not until 1997 that the Commission nominated a Special Rapporteur, on the topic, Mohamed Bennouna (Morocco), who was replaced by the South African Professor John Dugard after Bennouna's election to the ICTY.

In his first and only report, Bennouna immediately asked the question:

about the legal nature of diplomatic protection, i.e. of the holder of the underlying rights. It has been argued that owing to the development of the rights of the individual, who is increasingly recognized as a subject of international law, the Commission should reconsider classic law in this regard, as was forcefully stated by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case.<sup>71</sup>

In consequence, he expressed the wish that 'the Commission could answer the following question: when bringing an international claim, is the State enforcing its own right or the right of its injured national?',<sup>72</sup> while clearly favouring the second solution.<sup>73</sup>

After inconclusive discussions,<sup>74</sup> the ILC formed a working group whose response to this essential question reflected the division of its members, a majority adhering to the traditional fiction: 'The exercise of diplomatic protection is the right of the State. In the exercise of this right, the State should take into account the rights and interests of its nationals for whom it is exercising diplomatic protection.'<sup>75</sup> The uncertainty on this crucial point would influence the whole work of the ILC up to the adoption of the Draft Articles on second reading in 2006.

After his nomination as Special Rapporteur, Dugard strongly criticized the reservations of his predecessor regarding the *Mavrommatis* formula,<sup>76</sup> and encouraged the Commission to accept it, which it did in draft article 1; but it was not adopted until 2000<sup>77</sup> after long discussions and unofficial consultations.<sup>78</sup>

<sup>70</sup> Report of the ILC, 27th Session, *ILC Yearbook 1975*, Vol II, 56 (para 44).

<sup>71</sup> M Bennouna, Preliminary Report on Diplomatic Protection, *ILC Yearbook 1998*, Vol II(1), 309 (para 2).

<sup>72</sup> *Ibid* (para 54).

<sup>73</sup> See also the First and Third Reports by García Amador, *ILC Yearbook 1956*, Vol II, 127 (para 123), 214 (para 217); *ILC Yearbook 1958*, Vol II, 65 (para 18).

<sup>74</sup> *ILC Yearbook 1998*, Vol I, 4–32 (2520th to 2523rd meetings, 28 April to 1st May 1998).

<sup>75</sup> Report of the ILC, 50th Session, *ILC Yearbook 1998*, Vol II(2), 49 (para 108 c).

<sup>76</sup> J Dugard, First Report on Diplomatic Protection, 2000, A/CN.4/506, para 17.

<sup>77</sup> Report of the ILC, 54th Session, 2002, A/57/10, 169.

<sup>78</sup> See Report of the ILC, 52nd Session ILC, *ILC Yearbook 2000*, Vol II(2), 85; see also the debates at the Commission, *ILC Yearbook 2000*, Vol I, 38–78 (2617th to 2620th meetings) and, 100–102 (paras 1–21) (2624th Session, 19 May 2000).

This article was confirmed with the adoption of the text at the first reading in 2004.<sup>79</sup> It set out that the State acts 'in its own right' when it exercises diplomatic protection.<sup>80</sup> It was not until the very end, at the second reading of the draft in 2006 that the discussion was reopened because of an error in the French translation of the English original<sup>81</sup> (following an Italian proposal that was quite ambiguous).<sup>82</sup> This led to the adoption of a formulation that, without renouncing the *Mavrommatis* fiction directly, leaves at least 'open the question whether the State exercising diplomatic protection does so in its own right or that of its national—or both'.<sup>83</sup>

As far as the rest of the Articles are concerned, the text adopted on second reading in 2006 contains some advances, many half-measures, and a number of regrettable deficiencies.<sup>84</sup>

As far as the advances are concerned, article 8 must be mentioned. It extends the benefit of diplomatic protection to stateless persons and refugees, and envisages the possibility of a joint exercise of diplomatic protection by the States of nationality in cases of double or multiple nationalities (article 6(2)) or even by a State of nationality against another State if the nationality of the protected person is mainly (and continues to be) that of the first State (article 7). Other articles undoubtedly head in the right direction, but because of an absence of any clear theoretical viewpoint, the ILC often stopped short of removing the cobwebs from the venerable institution of diplomatic protection. Thus, even though it is certainly positive that the ILC has softened the rule of continuous nationality, it is regrettable that it has maintained the principle, which cannot be justified on any practical or theoretical ground (article 5). In a general fashion, the rules on diplomatic protection of legal persons (corporations) and shareholders, show an overcautious conservatism. It is regrettable that the ILC did not follow the Special Rapporteur who had proposed in a very well argued report<sup>85</sup> that the useful theory of the voluntary link, an essentially Anglo Saxon concept, should be accepted. Instead, the Commission substituted the vaguer notion of 'pertinent link' (article 15(c)) as an exception to the requirement of exhausting local remedies.

But the deficiencies that most seriously damage the credibility of the Draft Articles are the following. In truth, it does not codify (nor progressively develop) all the law on diplomatic protection, instead, at the instigation of the Special Rapporteur, it restricts itself to stating the rules on the admissibility of claims to diplomatic protection.<sup>86</sup> This does not cover the entire subject area: the forms of exercising protection and, more worrying, its effect are nearly entirely left out. The draft does not even mention the fundamental question of the effects of the renunciation of diplomatic protection (cf the *Calvo* clause), with

<sup>79</sup> Report of the ILC, 56th Session, 2004, A/59/10, 17–93 (paras 59–60).

<sup>80</sup> Articles on Diplomatic Protection, art 1.

<sup>81</sup> J Dugard, Seventh Report on Diplomatic Protection, 2006, A/CN.4/567, para 21.

<sup>82</sup> 'Comments and observations received from Governments', A/CN.4/561/Add.2, 2; see also A/CN.4/SR.2868 to 2871 (2–5 May 2006) and the report of the drafting Committee, A/CN.4/SR.2881 (30 May 2006).

<sup>83</sup> Articles on Diplomatic Protection (2006), Commentary to Article 1, para 5; Report of the ILC, 58th Session, 2006, A/61/10, 26; see Chapter 73.

<sup>84</sup> Report of the ILC, 58th Session, 2006, A/61/10, 16–103 (paras 49–50).

<sup>85</sup> J Dugard, Third Report on Diplomatic Protection, 2002, A/CN.4/523, paras 65–89.

<sup>86</sup> See J Dugard, First Report on Diplomatic Protection, 2000, A/CN.4/506, para 35 and J Dugard, Third Report on Diplomatic Protection, 2002, A/CN.4/523, para 15; see also Report of the ILC, 57th Session, 2005, A/60/10, 115–116 (paras 239–240).

regard to which Dugard had included important developments in his third report.<sup>87</sup> It is also deafeningly silent on how direct recourse on the part of private persons can be combined (in the area of human rights or foreign investments) with diplomatic protection. It also remains ambiguous (or at least very concise) with regard to the rights of the private person protected, which is then curiously the subject of the recommendations in article 19 of the second reading draft.

The first reading draft was entirely silent on the issue and it was not until his Seventh Report in 2006 that Dugard changed his mind in part and examined the issue of 'the right of the injured national to receive compensation'.<sup>88</sup> This led in the end to the inclusion of an article 19, entitled 'Recommended Practice', according to which a State 'should take into account, wherever feasible, the views of injured persons' and 'transfer to the injured person any compensation obtained for the injury from the responsible State . . .' This is slightly better than nothing . . .

By resolution 61/35 of 18 December 2007 the General Assembly took note of the Draft Articles on Diplomatic Protection without excluding the elaboration of a convention on the basis of the draft, just as the ILC had recommended. It is nevertheless illogical—and would be regrettable—if this not very convincing and deficient draft could give rise to a treaty while the Articles on State Responsibility remain in their current form, which is a likely prospect.<sup>89</sup>

### (b) The Draft Articles on Responsibility of International Organizations

Following an established pattern,<sup>90</sup> the Commission, having completed its *opus magnum* of rules applicable to States, embarked on examining how these rules can be adapted to international organizations. This was particularly necessary since article 57 of the Articles on State Responsibility states that:

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.

Consequently, the Commission decided to put responsibility of international organizations on its work programme in 2002, and nominated its Italian member, Professor Giorgio Gaja, as Special Rapporteur.

Gaja presented seven reports between 2003 and 2009, which were often dense and always concise. They conformed to the general orientation in the Report of the Working Group that was constituted in 2002 and over which he presided.<sup>91</sup> In the reports, he followed the plan of the Articles on State Responsibility, which permitted him to cover all questions in short order; in consequence the Draft Articles on the Responsibility of International Organizations were adopted on first reading in 2009.<sup>92</sup>

Even though the adaptation of the rules applicable to State responsibility does not cause particular problems, it is impossible to transpose them directly, especially because international organizations are themselves mostly composed of States. The inevitable question is what role these States have with regard to the origin of responsibility (can they or must they

<sup>87</sup> J Dugard, Third Report on Diplomatic Protection, 2002, A/CN.4/523.

<sup>88</sup> J Dugard, Seventh Report on Diplomatic Protection A/CN.4/567, 37 (paras 93–103).

<sup>89</sup> Report of the ILC, 58th Session, 2006, A/61/10, 15 (para 46).

<sup>90</sup> Cf the precedents concerning the law of treaties and immunities.

<sup>91</sup> Report of the ILC, 54th Session, 2002, A/57/10, 228 (paras 465–488).

<sup>92</sup> For the draft Articles on Responsibility of International Organizations and accompanying draft Commentaries, see Report of the ILC, 61st Session, 2009, A/64/10, 13–178.



be held responsible for internationally wrongful acts of an organization of which they are a member?) and its consequences (especially as far as reparation is concerned). Moreover, it was necessary to first define the notion of an international organization.

Gaja dealt with this in his first report.<sup>93</sup> But the definition he proposed was based on the idea of certain governmental functions,<sup>94</sup> and it was discarded in favour of a more classic concept that is probably more operational.<sup>95</sup> As for the rest, the draft adopted in 2009 follows the Articles on State Responsibility very closely, but is different on three issues that have caused long discussions at the Commission. Draft article 16 differentiates between situations where member States commit an internationally wrongful act in applying the decision of an organization or following the authorization or recommendation;<sup>96</sup> draft articles 60 and 61, which are included in a new Part 5 on 'Responsibility of a State in connection with the act of an international organisation', are related to the responsibility of a State that is a member of an international organization when the organization commits an internationally wrongful act, if the State has given it competence to shield it from an obligation or if it has expressly or implicitly accepted responsibility for the act;<sup>97</sup> and above all draft article 39 deals with measures '[e]nsuring the effective performance of the obligation of reparation'.<sup>98</sup>

It is on this last issue that the debates were particularly intense during the 59th Session of the ILC. Gaja's Fifth Report<sup>99</sup> did not envisage the possibility that an international organization that has incurred responsibility could find itself incapable of bearing the consequences, especially the financial ones; a question that is far from being purely theoretical. Since the debates made it clear that a majority of the members thought that the issue could not be left aside, an additional article was proposed that obliged member States to provide the organization with the means to discharge itself of any obligations in regard to reparation.<sup>100</sup> After some discussion, the draft was adopted in a more ambiguous version since it had been pointed out that this obligation for member States could only exist in accordance with the rules of the organization.<sup>101</sup> Furthermore, Valencia Ospina, the Colombian member of the Commission, made a potentially complementary proposal in the Drafting Committee to the effect that

[t]he responsible international organization shall take all appropriate measures in accordance with its rules in order to ensure that its members provide the organization with the means for effectively fulfilling its obligations under this chapter.<sup>102</sup>

The proposal was not adopted because of lack of support.

<sup>93</sup> G Gaja, First Report on Responsibility of International Organizations, 2003, A/CN.4/532, 7 (paras 12–34).

<sup>94</sup> *Ibid.*, 18 (para 34).

<sup>95</sup> Draft Articles on Responsibility of International Organizations, art 2(a); see also the definitions of the terms 'agent' and 'rules of the organization' in art 2(b) and (c).

<sup>96</sup> For the debates on this question see A/CN.4/SR.2839–2844 (17–25 May 2005).

<sup>97</sup> For the debates see A/CN.4/SR.2891–2895 (11–18 July 2006) and A/CN.4/SR.2902 (28 July 2006).

<sup>98</sup> Report of the ILC, 59th Session, 2007, A/62/10, 197; and see A/CN.4/SR.2935 (12 July 2007) and A/CN.4/SR.2938 (18 July 2007).

<sup>99</sup> G Gaja, Fifth Report on Responsibility of International Organizations, 2007, A/CN.4/583.

<sup>100</sup> See A/CN.4/SR.2935(e), (12 July 2007), 21 (A Pellet).

<sup>101</sup> For the debates, see A/CN.4/SR.2938 (18 July 2007); for the relevant provision as adopted on first reading, see Draft Articles on Responsibility of International Organizations, draft art 39; for the draft Commentary, see Report of the ILC, 61st Session, 2009, A/64/10, 123–125.

<sup>102</sup> See Commentary to draft art 39, para 4, *ibid.*, 124.

While awaiting the completion of the draft on second reading, it is evidently premature to predict its exact fate. It seems reasonable to assume that it will be similar to that of the 2001 Articles on State Responsibility.

### Further reading

The various reports of the Special Rapporteurs and texts of the ILC are listed at pp. lxi–lxiii above.

See also the Analytical Guide to the Work of the International Law Commission, available at <[http://untreaty.un.org/ilc/guide/9\\_6.htm](http://untreaty.un.org/ilc/guide/9_6.htm)>.

#### 1 State responsibility

- C Annacker 'Part Two of the ILC's Draft Articles on State Responsibility' (1994) 37 *GYBIL* 206  
 HP Aust, 'Through the Prism of Diversity: the Articles on State Responsibility in the Light of the ILC Fragmentation Report' (2006) 49 *GYBIL* 165  
 F Belaçh, 'Les réactions des gouvernements au projet de la CDI sur la responsabilité des États' (1998) 33 *AFDI* 512  
 J Breart de Boisanger, 'Travaux de la Commission du Droit international des Nations Unies' (1969) 15 *AFDI* 458 (esp 459–460)  
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