SYMPOSIUM: THE ILC'S STATE RESPONSIBILITY ARTICLES

INTRODUCTION AND OVERVIEW

By Daniel Bodansky and John R. Crook[*]

In August 2001, the International Law Commission (ILC) adopted its "Draft Articles on the Responsibility of States for Internationally Wrongful Acts,"[1] bringing to completion one of the Commission's longest running and most controversial studies. On December 12, 2001, the United Nations General Assembly adopted Resolution 56/83, which "commend[ed the articles] to the attention of Governments without prejudice to the question of their future adoption or other appropriate action."[2]

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

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

At the outset, the ILC's first special rapporteur on state responsibility noted, "[I]t would be difficult to find a topic beset with greater confusion and uncertainty."[3] And throughout the ILC's consideration of the subject, skepticism and controversy abounded, particularly among those trained in the common law, to whom the abstract treatment of "responsibility,"

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[1] Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-third Session [hereinafter ILC 53d Report], UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), *available at* <http://www.un.org/law/ilc>. The articles are also annexed to GA Res. 56/83, *infra* note 2. The final articles, commentaries, prior drafts, tables showing the derivation of each provision, bibliography, and an informative introduction by the last special rapporteur on state responsibility, all appear in JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002). References to, and quotations of, the articles, as well as the official ILC commentaries to the articles, which appear in the Commission's 53d Report and Crawford's volume, *supra*, will be identified below by article and paragraph number.

[2] GA Res. 56/83, para. 3 (Dec. 12, 2001). Resolutions of the General Assembly since 1977 are available online at <http://www.un.org/docs>.

[3] F. V. García-Amador, First Report on International Responsibility, [1956] 2 Y.B. Int'l L. Comm'n 173, 175, para. 6, UN Doc. A/CN.4/SER.A/1956/Add.1.

as such, is unfamiliar.[4] Some see the articles as "a bland gruel not likely to upset the most dyspeptic government official,"[5] others as perhaps the ILC's most important product.[6]

Whatever one's view of the articles, however, their adoption by the ILC doubtless represents a significant moment in the continuing development of international law. That is the motivation for this symposium.

All of the essays here explore in varying ways the question: do the articles represent the future of international law or its past? The articles developed over a long time, during which international law and international society underwent significant changes. Nonstate participants came to play more prominent roles. New conceptions evolved about who holds rights and obligations under international law. And highly developed, specialized legal regimes appeared. Early in its work, the ILC stressed that "careful attention should be paid to the possible repercussions which new developments in international law may have had on responsibility."[7] A major objective of this symposium is to assess how well the articles succeeded in achieving this goal. Do they appropriately reflect developments in international law and international society over the past half-century or are they to some degree "flies in amber"?

In *Parkinson's Law*, Northcote Parkinson quipped that by the time an institution has built its headquarters it is usually obsolete.[8] At first glance, the same might be said of the ILC's work on state responsibility. During the articles' long gestation, much of the action in international law shifted to specialized regimes such as the General Agreement on Tariffs and Trade and the World Trade Organization, regional human rights bodies such as the European Court of Human Rights, bilateral investment treaties, and the newly emerging compliance procedures in international environmental instruments. Many have their own dispute settlement procedures and their own *lex specialis* on responsibility. Arguably, this increasing specialization and fragmentation of international law has made the ILC's project of elaborating a general law of state responsibility a bit anachronistic.

But the trend toward specialized regimes could also have the opposite effect, heightening the importance of general rules that can fill gaps and play a unifying role in international law—particularly given the proliferation of international tribunals, which are likely to be the articles' primary consumers.[9] Few, if any, international regimes are fully self-contained. Most do not deal in a comprehensive manner with important issues addressed by the articles, such as attribution, circumstances that preclude wrongfulness, remedies, and countermeasures.

[4] James R. Crawford, *Responsibility to the International Community as a Whole*, 8 IND. J. GLOBAL LEGAL STUD. 303, 304 (2001) ("the idea of a general law of international obligations does not strike any particular resonance in the common law mind"). For examples of reactions by common lawyers to the ILC's work, see, for example, MYRES S. MCDOUGAL, HAROLD D. LASSWELL, & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 762 n.92 (1980) (ILC's work "at such a high level of abstraction as to shed but a dim light upon specific controversies"); Richard Kearney, [1970] 1 Y.B. Int'l L. Comm'n 217, UN Doc. A/CN.4/SER.A/1970 (abstract responsibility might prove too "metaphysical"); Richard B. Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, *in* INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 1, 21 (Richard B. Lillich ed., 1983) (ILC approach offers "little or no guidance").

[5] Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. 1, 2 (1988).

[6] Bruno Simma, Remarks, *in* UNITED NATIONS, THE INTERNATIONAL LAW COMMISSION FIFTY YEARS AFTER: AN EVALUATION 43 (2000).

[7] Roberto Ago, Report of the Sub-Committee on State Responsibility, [1963] 2 Y.B. Int'l L. Comm'n 227, 228, para. 5, UN Doc. A/CN.4/SER.A/1963/Add.1 [hereinafter Subcommittee Report].

[8] C. NORTHCOTE PARKINSON, PARKINSON'S LAW OR THE PURSUIT OF PROGRESS 90 (1957) ("It is now known that a perfection of planned layout is achieved only by institutions on the point of collapse."); *id.* at 92 ("By the year when [the League of Nations'] Palace was formally opened the League had practically ceased to exist.").

[9] The proliferation of tribunals, in particular, has been widely noted, *see, e.g.*, Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 NYU J. INT'L L. & POL. 697 (1999); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?* 271 RECUEIL DES COURS 101 (1998); Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?* 95 AJIL 535 (2001); IMPLICATIONS OF THE PROLIFERATION OF INTERNATIONAL ADJUDICATORY BODIES FOR DISPUTE RESOLUTION, ASIL BULL., No. 9, 1995, and has triggered expressions of concern in many quarters, not least by the president of the International Court of Justice, *see* Gilbert Guillaume, Speech to the General Assembly of the United Nations (Oct. 31, 2001), *at* <http://www.icj-cij.org>.

Thus, there is a continuing, perhaps even growing, need for clear and comprehensive rules that decision makers can use to fill gaps when deciding particular cases. If the Commission has done its work well, in a way that can be applied effectively in practice, the articles could play such a role, providing reasoned rules—or, perhaps more appropriately, useful points of departure—in areas where specialized regimes are not yet fully developed. Even before the ILC had completed the articles, they had begun to influence the work of international tribunals, including the International Court of Justice.[10] Their completion can be expected to increase their impact.

Indeed, some commentators believe that the real danger is not that the articles will have too little influence but, rather, that they will have too much. As David Caron argues, their seductive clarity, seeming concreteness, and treatylike form, together with the paucity of other sources on some important issues, may tempt decision makers to apply the articles verbatim, rather than treat them only as evidence of the relevant international rule.[11] Caron cautions decision makers not to give the articles such unwarranted authority, and urges them to scrutinize the articles rigorously, together with all of their associated context and history, in weighing whether the ILC offers the right result.

The degree to which the articles are, and should be taken as, authoritative closely relates to a second theme found in this symposium, namely their foundations. Almost inevitably, many legal and policy judgments lie behind the texts. All of the contributors weigh the extent to which these judgments result from inductive analysis of state practice or from a more prescriptive approach aimed at the "progressive development" of international law.[12] Separating these elements, of course, is difficult. Nevertheless, attempting to distinguish between codification and progressive development serves an important function, particularly in areas where the articles may significantly influence the handling of specific disputes. The symposium addresses two of the most important such areas, countermeasures and remedies. David Bederman considers the extent to which the articles on countermeasures depart from existing law, and whether they may ultimately encourage or discourage resort to countermeasures.[13] Dinah Shelton analyzes the treatment of remedies, suggesting that the articles are designed to promote the maintenance of international legality and not simply the adjustment of bilateral disputes.[14]

One important development in the law of international responsibility that the articles do not attempt to codify, much less progressively develop, is the growing importance of nonstate actors as holders of international rights and obligations. As Edith Brown Weiss discusses in her contribution, not only has international law become increasingly specialized and fragmented, but it increasingly focuses on the responsibility of nonstate actors such as individuals and terrorist groups and on the obligations of states toward individuals. These legal relationships largely remain outside the scope of the ILC's study of international responsibility, which generally adopts a traditional, state-to-state approach.[15]

[10] *See, e.g.*, Gabčíkovo-Nagymaros Project (Hung./Slovk.), 1997 ICJ REP. 7, 39–46, paras. 49–58 (Sept. 25). For other references to the articles by the International Court of Justice (ICJ) and other important tribunals, see CRAWFORD, *supra* note 1, at 16 n.48.

[11] David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AJIL 857 (2002).

[12] Article 13 of the UN Charter empowers the General Assembly to initiate studies and make recommendations for "the progressive development of international law and its codification." The General Assembly created the ILC for this purpose at its second session in 1947. Statute of the International Law Commission, GA Res. 174 (II), UN GAOR, 2d Sess., Res. at 296, UN Doc. A/519 (1947). The ILC's Statute gives as the Commission's object "the promotion of the progressive development of international law and its codification." *Id.*, Art. 1(1).

[13] David J. Bederman, *Counterintuiting Countermeasures*, 96 AJIL 817 (2002).

[14] Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AJIL 833 (2002).

[15] Edith Brown Weiss, *Invoking State Responsibility in the Twenty-first Century*, 96 AJIL 798 (2002).

A final theme, suggested in Robert Rosenstock's essay and appearing elsewhere in the symposium, concerns the interplay between the Commission and the political context in which it worked.[16] Although the Commission is composed of independent experts, it is nevertheless answerable to the General Assembly, particularly to the varied states that take active part in the Assembly's Sixth (Legal) Committee, and ultimately to the entire "invisible college."[17] As past projects of the Commission have shown, when the ILC loses its political bearings, its work has little impact.[18] In considering state responsibility, the Commission recognized that its eventual product ultimately had to find a measure of acceptance by states. This led to a change of direction on more than one occasion, the dropping of some of the most controversial elements (in particular, Article 19 on state crimes), and much streamlining and simplification of the text.

The co-editors come to this project with a shared concern about the effectiveness and relevance of international law in the real world, but begin from somewhat different perspectives, one more theoretical and the other more focused on the demands of practice. As this symposium illustrates, the articles provide ample food for thought for both. Although at first glance the articles seem well removed from the contemporary preoccupations of theorists with law and economics, critical legal studies, feminism, and international relations,[19] they raise challenging conceptual issues going to the fundamentals of international obligation. For the diplomat or international legal practitioner, the articles likewise pose difficult and important issues of analysis and application to particular disputes.

I. A Brief History

Traditionally, the term "state responsibility" has had both a narrower and a broader scope than the ILC articles—narrower in that it referred only to a limited subject, namely, state responsibility for injuries to aliens; broader in that it embraced the whole range of issues relating to that subject, including not only "secondary" issues such as attribution and remedies, but also the primary rights and duties of states, for example, the asserted international standard of treatment and the right of diplomatic protection.[20] Although cases like the *Alabama* illustrate that a much broader idea of state responsibility for any internationally wrongful act had already emerged in the nineteenth century, until relatively recently most scholars did not address this broader concept as a distinct subject.[21] Even today, the term "state responsibility" is often used as shorthand for the specialized area of international law on the treatment of aliens.[22]

Early efforts by the League of Nations and private bodies to codify the rules of "state responsibility" reflected the traditional focus on responsibility for injuries to aliens.[23] Foreshadowing

[16] Robert Rosenstock, *The ILC and State Responsibility*, 96 AJIL 792 (2002).

[17] Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977).

[18] *E.g.*, Stephen McCaffrey, *Is Codification in Decline?* 20 HASTINGS INT'L & COMP. L. REV. 639, 643–48 (1997) (discussing unsuccessful ILC work on the status of the diplomatic courier and diplomatic bag and other ILC projects with limited influence).

[19] *See Symposium on Method in International Law* (Steven R. Ratner & Anne-Marie Slaughter eds.), 93 AJIL 291 (1999).

[20] *See, e.g.*, CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928).

[21] As Ian Brownlie notes, standard nineteenth-century international law treatises such as Hall, Phillimore, and Calvo contained little or no discussion of state responsibility in this wider sense. Even in the twentieth century, Brierly's famous treatise on international law did not address state responsibility as a distinct issue. IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, PT. I, at 2, 7 (1983).

[22] *See, e.g.*, INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS, *supra* note 4; L. F. E. Goldie, *State Responsibility and the Expropriation of Property*, 12 INT'L LAW. 63 (1978).

[23] *See* Edwin M. Borchard, "*Responsibility of States" at the Hague Codification Conference*, 24 AJIL 517 (1930); Green H. Hackworth, *Responsibility of States for Damages Caused in Their Territory to the Person or Property of Foreigners*, 24 AJIL 500 (1930). *See generally* Y. Matsui, *The Transformation of the Law of State Responsibility*, 20 THESAURUS ACROASIUM 1 (1993). Ago's first report on state responsibility includes a useful compendium of the various codification efforts prior to World War II, including by the Institute of International Law and the International Law Association.

the history of the topic in the International Law Commission, the League's 1930 Codification Conference in The Hague was able to reach agreement only on "secondary" issues such as imputation, not on the substantive rules regarding the treatment of aliens and their property.[24] With respect to the latter, the League's efforts were defeated by the schism between European and North American proponents of an international standard of justice and the (mostly Latin) proponents of national treatment.

Given the centrality of the subject in international law,[25] as well as the League's extensive codification efforts, state responsibility was an obvious candidate for inclusion on the ILC's initial list of topics. But the ILC did not merely pick up where the League had left off. Instead, in listing state responsibility as a potential topic for codification, the Commission distinguished it from a separate topic on the "treatment of aliens," reflecting the growing view that state responsibility encompasses the breach of any international obligation, not just those concerning the protection of aliens.[26]

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

Initially, the ILC's work got off to a false start when García-Amador attempted to return to the traditional focus on responsibility for injury to aliens. He recognized that international responsibility could result from a "practically unlimited number and variety of circumstances."[27] But precisely because the topic of responsibility is so "vast,"[28] he sought to limit it by starting with the narrower topic of diplomatic protection, which had already received extensive consideration. In a series of six reports submitted between 1956 and 1961, García-Amador engaged in an ambitious effort to integrate the substantive rules for the protection of aliens with emerging human rights law.[29]

Although García-Amador's reports are still cited,[30] and some of his specific proposals ultimately found their way into the articles,[31] his emphasis on diplomatic protection proved divisive and stimulated a heated debate by the Commission in 1957. Subsequently, the Commission never discussed any of his proposals in detail.[32] When his membership ended in 1961, the ILC essentially abandoned his work and appointed a subcommittee, chaired by Roberto Ago of Italy, to reconsider how to proceed.

In his subcommittee report of 1963, Ago laid out the approach that has served as the basis for the ILC's work ever since, focusing on the general "secondary" rules of state responsibility rather than particular primary rules of obligation (such as for injury to aliens).[33] As Ago

Roberto Ago, First Report on State Responsibility: Review of Previous Work on Codification of the Topic of the International Responsibility of States, [1969] 2 Y.B. Int'l L. Comm'n 125, 141–55, UN Doc. A/CN.4/SER.A/1969/Add.1.

[24] Matsui, *supra* note 23, at 32–33.

[25] *See* Karl Zemanek, *Responsibility of States: General Principles*, 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 219, 228 (2000) (central role of state responsibility makes codification "imperative").

[26] 1949 Y.B. Int'l L. Comm'n 46, 49–50, UN Doc. A/CN.4/SER.A/1949.

[27] García-Amador, *supra* note 3, at 176, para. 11.

[28] *Id.*

[29] García-Amador's revised draft, "Responsibility of the State for Injuries caused in its territory to the person or property of aliens," is set forth in his sixth report, [1961] 2 Y.B. Int'l L. Comm'n 46, UN Doc. A/CN.4/SER.A/1961/Add.1; *see also* F. V. GARCÍA-AMADOR, LOUIS B. SOHN, & R. R. BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1974).

[30] *E.g.*, THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 136 n.1, 157 n.68 (1989).

[31] CRAWFORD, *supra* note 1, at 15 & n.45.

[32] *Id.* at 2.

[33] Subcommittee Report, *supra* note 7, at 228.

put it, the ILC should concentrate on "the whole of responsibility and nothing but responsibility."[34] By divorcing the Commission's work from debates over the primary rules of international obligation, Ago allowed the ILC to elaborate lawyers' law, which with a few exceptions was not threatening to states.

Ago's imprint on the articles was decisive.[35] Not only did he reconceptualize the ILC's work in terms of the distinction between primary and secondary rules, but he also established the basic organizational structure of the articles, dividing them into two parts: first, the origin of international responsibility, including definition of the wrongful act, attribution (or as the issue was referred to then, "imputation"), and circumstances precluding wrongfulness; and second, the forms and consequences of international responsibility, including the duty to make reparation and the right to apply sanctions.[36]

Following his subcommittee report of 1963, the ILC appointed Ago as special rapporteur,[37] but it then turned to other issues and did not revisit state responsibility until his first report in the latter capacity in 1969.[38] Over the next ten years, until his election to the International Court of Justice in 1980, Ago completed work on part 1 of the draft articles, addressing the origin of state responsibility.[39] Most of the thirty-five articles adopted during his tenure are reflected in the final draft, with the exception of Article 19 on state crimes, which the ILC dropped in the last stages of the project.

Work on the remainder of the articles proceeded slowly through the 1980s and early 1990s. Ago's version of part 1 had been "coherent and comprehensive"; but, as the last special rapporteur, James Crawford of Australia, notes, he "left few clues as to how the text as a whole should be completed."[40] Initially, this task fell to Willem Riphagen of the Netherlands, who served as special rapporteur from 1980 to 1986. In contrast to Ago, who focused on what David Caron calls the "trans-substantive" nature of the law of responsibility, Riphagen stressed that particular primary rules may specify the consequences of their breach[41]—an idea conveyed by the articles through the recognition of *lex specialis*.[42] He also emphasized that the articles should deal only with responsibility for wrongful acts, not liability for injuries arising from lawful acts, a subject addressed by a separate ILC study.

Riphagen's reports offer many interesting theoretical insights but are challenging. Only five articles were provisionally adopted during his seven-year tenure as special rapporteur, the most important focusing on the definition of the "injured State," which was largely revised by Crawford. Significant progress did not resume until Gaetano Arangio-Ruiz's appointment

[34] *Id.* at 253.

[35] The commentaries describe Ago as the person "responsible for establishing the basic structure and orientation of the project." Commentaries, Introduction, para. 2.

[36] During the second reading, the second part was divided into two parts, one dealing with the legal consequences of an unlawful act for the state committing the breach, the other with "implementation of state responsibility" by other states. This approach had been contemplated by Ago, who identified a potential "third task" of "implementation" and "questions concerning settlement of disputes" in his 1970 report. He noted that this third task could be considered after the first two tasks—concerning the origins and forms of international responsibility—were completed. Roberto Ago, Second Report on State Responsibility, [1970] 2 Y.B. Int'l L. Comm'n 177, 178, para. 8, UN Doc. A/CN.4/SER.A/1970/Add.1.

[37] Report of the International Law Commission on the Work of Its Fifteenth Session, [1963] 2 Y.B. Int'l L. Comm'n 187, 224, para. 55, UN Doc. A/CN.4/SER.A/1963/Add.1.

[38] Roberto Ago, First Report of the Special Rapporteur, [1969] 2 Y.B. Int'l L. Comm'n 125, UN Doc. A/CN.4/SER.A/1969/Add.1.

[39] Report of the International Law Commission on the Work of Its Thirty-second Session, [1980] 2 Y.B. Int'l L. Comm'n, pt. 2, at 26, 30, UN Doc. A/CN.4/SER.A/1980/Add.1 (Part 2).

[40] CRAWFORD, *supra* note 1, at 2, 3.

[41] Willem Riphagen, Second Report on the Content, Forms and Degrees of International Responsibility, [1981] 2 Y.B. Int'l L. Comm'n, pt. 1, at 79, 82, UN Doc. A/CN.4/SER.A/1981/Add.1 (Part 1) ("[T]he manner in which the 'primary rules' are established and the different functions of those 'primary rules' cannot but influence both the various contents of 'State responsibility' and the modalities of its 'implementation'.").

[42] Art. 55.

as special rapporteur in 1988. Arangio-Ruiz's work helped clarify the consequences of breaches of international obligations, by emphasizing in particular the duty to cease continuing violations[43] and the role of interest in reparation.[44] Over the next eight years, the ILC completed its first reading of parts 2 and 3.[45] Although most of these articles are reflected in the final text, the part addressing dispute settlement—perhaps the subject most associated with Arangio-Ruiz—did not survive the second reading.[46]

By 1996, when the ILC appointed Crawford as special rapporteur, the ILC had had state responsibility on its agenda for more than forty years and was understandably eager to bring the subject to a close. Moreover, the General Assembly had adopted a resolution in December 1995 in effect pressing the Commission to make progress on the state responsibility articles and other long-pending projects.[47] Crawford approached the task pragmatically, recognizing that, to reach closure, the Commission would need to abandon much that had been both challenging and controversial in its prior work, including in particular Article 19 on state crimes and the section on dispute settlement. Reflecting both his political and his technical skills and perhaps a certain degree of exhaustion, the ILC moved rapidly through a second reading of the draft articles, adopting what it could agree on and jettisoning the rest. The result is a text that is highly polished but ultimately sometimes abstract and thin.

II. Basic Premises

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

— First, the breach of an international obligation gives rise to a new legal regime, with its own distinctive set of legal duties and rights. The object of the articles is to set forth these rules, together with the rules governing the conversion from the normal regime of international law to the new regime of state responsibility. Ago characterized both types of rules as "secondary" rules, which differ in kind from the "primary" rules of obligation establishing particular standards of conduct (e.g., do not use force without Security Council authorization, except in self-defense; do not take property without adequate compensation; do not cause significant transboundary pollution).[48] Rather than set forth any particular obligations, the rules of state responsibility determine, in general, when an obligation has been breached and the legal consequences of that violation.

— Second, the secondary rules of state responsibility, as Crawford notes, are "rigorously general in . . . character,"[49] encompassing all types of international obligations

[43] Gaetano Arangio-Ruiz, Preliminary Report on State Responsibility, [1988] 2 Y.B. Int'l L. Comm'n, pt. 1, at 42, UN Doc. A/CN.4/SER.A/1988/Add.1 (Part 1).

[44] Gaetano Arangio-Ruiz, Second Report on State Responsibility, [1989] 2 Y.B. Int'l L. Comm'n, pt. 1, at 23–30, UN Doc. A/CN.4/SER.A/1989/Add.1 (Part 1).

[45] For the articles as adopted on first reading, see Draft Articles on State Responsibility Provisionally Adopted by the International Law Commission on First Reading, *in* Report of the International Law Commission on the Work of Its Forty-eighth Session, [1996] 2 Y.B. Int'l L. Comm'n, pt. 2, at 58, UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), *reprinted in* CRAWFORD, *supra* note 1, at 348 [hereinafter First Reading Articles].

[46] A very useful table tracing the ILC's consideration of the articles from their first through their second reading can be found in CRAWFORD, *supra* note 1, at 315–46.

[47] GA Res. 50/45, para. 3 (Dec. 11, 1995).

[48] As the Commission noted, "[I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation." Report of the ILC on the Work of Its Twenty-second Session, [1970] 2 Y.B. Int'l L. Comm'n, *supra* note 36, at 271, 306, para. 66(c). Ago's distinction between primary and secondary rules differs from the dichotomy drawn by H. L. A. Hart, who characterized secondary rules as rules about rules, addressing the creation, interpretation, and enforcement of the primary rules of obligation. H. L. A. HART, THE CONCEPT OF LAW 91–92 (1961). In Hart's conception, the Vienna Convention on the Law of Treaties would set forth secondary rules of how key international law primary rules (treaties) are formed, interpreted, and terminated. For more on the ILC's primary/secondary distinction, see *infra* notes 56–61 and accompanying text.

[49] CRAWFORD, *supra* note 1, at 12.

> regardless of their source, subject matter, or importance to the international community.[50] They apply to both acts and omissions, to treaty obligations and customary norms, to breaches of bilateral as well as multilateral obligations, and to the whole gamut of particular subject areas—human rights law, environmental law, humanitarian law, economic law, the law of the sea, and so forth.

It is worth emphasizing the distinctive character of this approach to state responsibility. In common-law countries, there is no general regime of legal responsibility. Substantive rules are classified by their subject matter (e.g., criminal law, tort, contracts, property, family law), each characterized by its own regime of "responsibility" with its own remedies, rules of attribution and invocation, and so forth.[51] Indeed, to many common lawyers, the notion that *anything* useful can be said of a general nature about obligation or responsibility seems alien.[52] Common lawyers tend to find comfort in Holmes's famous aphorism that the life of the law is not logic but experience. But the various special rapporteurs, except the last, have come from the civil-law tradition and have been more at home with the notion of articulating homogeneous, general rules of responsibility.

Because the secondary rules of state responsibility are general in nature, they can be studied independently of the primary rules of obligation. They evince neutrality on many disputed or controversial substantive matters. This was the key that allowed Ago to unlock state responsibility from the box into which García-Amador had placed it through his effort to articulate substantive norms governing the protection of aliens. By focusing on general rules of responsibility, stated at a high level of abstraction, Ago created a politically safe space within which the ILC could work and largely avoid the contentious debates of the day about expropriation and valuation of property.[53]

It should be borne in mind, however, that although the articles are general in coverage, they represent only default or residual rules; they do not necessarily apply in all cases. Particular treaty regimes or rules of customary international law can establish their own special rules of responsibility—for example, regarding remedies—that differ from those set forth in the articles.[54] Indeed, "self-contained" treaty regimes such as the General Agreement on Tariffs and Trade and the European Convention on Human Rights may establish a more or less complete regime of responsibility to which the articles are inapplicable.[55]

Following Ago, the ILC explained the character of the articles through the distinction between "secondary" and "primary" rules. But this distinction has proved elusive and in any event is unnecessary. To some degree, classifying an issue as part of the rule of conduct (the primary rule) or as part of the determination of whether that rule has been violated (the secondary rule) is arbitrary. What defines the scope of the articles is not their "secondary"

[50] The rules enunciated in the draft articles are intended to reflect a "single general régime of State responsibility." Commentaries, Art. 12, para. 5. The one exception to the uniformity of the regime involves serious breaches of peremptory norms under Articles 40 and 41—the remaining vestige of the category of state crimes—which the ILC acknowledges "necessarily affect the vital interests of the international community as a whole and may entail a stricter régime of responsibility than that applied to other internationally wrongful acts." *Id.*, para. 7.

[51] One of the few exceptions in the common law is civil procedure, which sets forth a distinctive set of rules that apply across the various substantive areas of law—although the common law still distinguishes civil procedure from criminal and administrative procedure and thus does not treat procedure as a fully homogeneous field.

[52] *See supra* note 4 and corresponding text; *see also* Allott, *supra* note 5, at 12; R. R. Baxter, *Reflections on Codification in Light of the International Law of State Responsibility for Injuries to Aliens*, 16 SYRACUSE L. REV. 745, 748 (1964–65) ("The circumstances under which responsibility attaches and the remedies to be provided for violations of the rules of law cannot be divorced from the substantive rules of conduct themselves."); Christine Gray, *Is There an International Law of Remedies?* 1986 BRIT. Y.B. INT'L L. 25, 27.

[53] Matsui, *supra* note 23, at 55.

[54] Recognizing that none of the articles is sacrosanct, the ILC in its second reading moved the provision allowing *lex specialis* from the section addressing the consequences of breach to the general provisions that apply to the text as a whole. *See* CRAWFORD, *supra* note 1, at 336 (drafting history of Article 55).

[55] *But see* Bruno Simma, *Self-Contained Regimes*, 1985 NETH. Y.B. INT'L L. 111 (questioning whether these regimes are fully self-contained).

status but their generality: the articles represent those areas where the ILC could identify and reach consensus on general propositions that can be applied more or less comprehensively across the entire range of international law.[56] They express what the ILC believes could be said, in general, of international obligations and their breach.

Consider, for example, the contrasting treatment of fault and injury, on the one hand, and attribution, on the other. The articles decline to address the former on the ground that fault and injury are determined by the primary rules. But the articles do set forth detailed "secondary" rules of attribution. One could just as well argue, however, that fault and injury relate to whether a particular rule of conduct has been violated (and hence are secondary rules), and that attribution is part of the complete specification of a primary rule (i.e., by addressing the actors to whom the primary rule applies).[57]

Given the elusiveness of the line between "primary" and "secondary" rules, commentators have not surprisingly displayed considerable confusion about categorizing particular issues such as attribution and fault. One commentator, for example, criticized the rules on attribution for providing only limited state responsibility for acts of individuals,[58] only to be told in response not to worry, since the primary rules can create much wider state responsibility for private acts[59]—a point illustrated by the *Tehran Hostages* case and by environmental agreements that require states to limit national emissions of pollutants, including those by private entities.[60]

As to fault, the Commission correctly notes in the commentary that there is no general rule of international law requiring fault: whether fault is an element of a wrongful act depends on the primary rule in question.[61] But the absence of a general rule does not in itself imply that fault is a primary rather than a secondary issue. The real point is that the ILC did not find it possible to say anything of a general nature about the issue. The articles reflect the ILC's belief that trans-substantive default rules exist regarding attribution, justifications, and remedies, but not fault or injury—hence, the former issues are included in the articles but not the latter.

The ILC articles presume that international law is a unified body of law, with common characteristics that operate in similar ways across its various fields (subject, of course, to *lex specialis* derogations created by particular states in particular settings). Whether this is a desirable approach will be a matter of debate. In response to the fragmentation of international law, many see unity and coherence in international law as virtues.[62] But a one-size-fits-all approach may come at a certain price, by inhibiting the elaboration of more variegated international norms—liability rules, property rules, and so forth, each with their own characteristic set of remedies[63]—which can be used in a more precise way to pursue a complex range of community goals.[64]

[56] Although the Commission's rules permit voting, and informal straw polls do occur, its general practice is to pursue a final result that reflects a consensus among the members. This was the case for the state responsibility articles as well. On matters involving significant divisions of opinion on the Commission (for example, Articles 40 and 41), the commitment to consensus decision making probably created additional space within which the special rapporteur could try to devise compromise outcomes acceptable to contending camps.

[57] BROWNLIE, *supra* note 21, at 36, 163.

[58] Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUR. J. INT'L L. 387, 395 (1999).

[59] James Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUR. J. INT'L L. 435, 439 (1999).

[60] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3 (May 24); *see infra* notes 73–74 and corresponding text. Federalism clauses are considered by the draft articles to be *lex specialis*, qualifying the general secondary rule of Article 4 that states are responsible for acts of territorial units, rather than an element of the primary rule's specification of the duties owed by federal states. *See* Commentaries, Art. 4, para. 10.

[61] Commentaries, Art. 2, paras. 3, 10.

[62] *See, e.g.,* Crawford, *supra* note 59, at 437.

[63] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

[64] For example, in response to criticisms that the draft articles allow countermeasures in response to any breach of international law, Crawford provides a formalistic rather than a functional response: "state responsibility covers

III. SIGNIFICANT FEATURES

The articles vary greatly in their specificity. With respect to some issues, the only rules that could be enunciated to apply across the entire range of international law were essentially tautologies. In other areas, the articles are quite detailed. Throughout, the ILC and its various special rapporteurs had to find balanced results acceptable within the Commission and likely to be acceptable to states in the General Assembly and other future "consumers." Like more overtly political negotiations, the ILC's deliberations on state responsibility resulted in some provisions that represent least common denominators or rely on creative ambiguity.

Definition of an Internationally Wrongful Act

The articles define how state responsibility comes into play in purely formal terms. Article 1 states that "every internationally wrongful act of a State entails the international responsibility of that State." Crawford has called this article—without apparent irony—"as near a piece of genius as the Commission has ever come to."[65] But it is essentially tautological, pushing into the phrase "internationally wrongful act" key substantive issues, such as whether fault and injury are conditions of international responsibility in particular situations. The articles characterize other core concepts in equally tautological terms. Article 2 defines an "internationally wrongful act" as an act attributable to a state that constitutes a breach of an international obligation. Article 12 defines "breach of an international obligation" as "an act . . . not in conformity with what is required . . . by that obligation." Together, these articles state what is, in essence, a logical equation: conduct not in conformity with an international obligation and attributable to a state equals an internationally wrongful act resulting in state responsibility.

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

Crawford characterizes the articles as establishing an "objective" regime of responsibility, since they define the breach of an international obligation in objective terms, without reference to the actor's mental state.[66] But, strictly speaking, the articles are in themselves neutral; they establish neither an objective nor a subjective regime. Instead, they leave it to the primary rules of obligation to determine whether the wrongfulness of an act depends on fault, intention, lack of diligence, or the like.

Attribution

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

the whole field of the primary norms of international law . . . . It follows that the regime of countermeasures covers that whole field as well." James Crawford, *On Re-Reading the Draft Articles on State Responsibility*, 92 ASIL PROC. 295, 298–99 (1998).

[65] Crawford, Remarks, *in* UNITED NATIONS, *supra* note 6, at 52, 53.

[66] CRAWFORD, *supra* note 1, at 12–14.

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

Despite their apparent concreteness, the standards stated in some rules involve important ambiguities, and their application will often require significant fact-finding and judgment. What constitutes "governmental authority" for purposes of Articles 5 and 9, for example? What does it mean to be under a state's "direction or control" for purposes of Article 8?[67] As the commentaries note, important international tribunals have approached these questions in quite different ways.[68] The Commission was well aware that the articles on attribution sometimes suggest more precision or concreteness than is found in the world. Article 4(2), for example, defines a state organ to include any person or entity having that status under a state's internal law. But, as the commentary notes, national law may be an imperfect or incomplete guide, or have nothing to say on the matter at all, so that particular factual circumstances rather than national law will be determinative.[69]

Nevertheless, the rules of attribution offer starting points for assessing responsibility for private conduct or for conduct mixing state and nonstate actors. Article 5 concerns the variety of entities that are not formally organs of the state and that may not fall under its immediate direction or control, but that nevertheless carry on aspects of governmental authority, including "para-statals" and even private security firms.[70] Article 8 deals with cases where a person or group acts under a state's instructions, direction, or control. In failed or poorly functioning states, Article 9 provides for state responsibility if nonstate actors step in to perform governmental functions in the absence or default of official authority. And Article 11 (one of several new articles added during Crawford's tenure as special rapporteur)[71] posits attribution where a state acknowledges and adopts private conduct, as in the *Hostages* case.[72] This rule operates retroactively, making a state responsible for prior conduct by private parties if it "acknowledges and adopts the conduct . . . as its own."

Still, the rules of attribution set forth in the articles represent only the tip of the iceberg as to when private acts can create state responsibility. Most such responsibility arises as a result of primary rules—for example, to prevent or limit particular types of private conduct.[73] Thus, compliance by states with environmental agreements depends in many cases not simply on state action, but on the actions of private parties, whose failure to reduce their pollution to the levels required by an agreement may cause a state to violate its obligations.[74] Similarly, some human rights agreements, such as the Convention on the Elimination of Racial Discrimination, require states to prevent abuses by private parties.[75]

[67] Article 8 makes conduct by a person or group attributable to the state if the person or group "is in fact acting on the instructions of, or under the direction or control of, that State."

[68] The commentaries note the different approaches to the meaning of "control" taken by the International Court of Justice in its 1986 *Nicaragua* Merits Judgment (imposing a rather high test for determining whether conduct by the contras was attributable to the United States), as compared with the seemingly less demanding standard applied by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadić* in assessing individual criminal responsibility. Commentaries, Art. 8, paras. 4, 5.

[69] Commentaries, Art. 4, para. 11.

[70] Commentaries, Art. 5, paras. 1–7.

[71] Other new articles added in the later stages of the ILC's deliberations include Articles 26 (peremptory norms), 33 (scope of obligations covered), 40 (breaches of obligations under peremptory norms), 43 (notice of claim), 45 (loss of right to invoke responsibility), 47 (plurality of responsible states), 53 (termination of countermeasures), 54 (measures by states other than injured states), and 58 (individual responsibility). CRAWFORD, *supra* note 1, at 315–46.

[72] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3 (May 24).

[73] *See* Gordon A. Christenson, *Attributing Acts of Omission to the State,* 12 MICH. J. INT'L L. 312 (1991).

[74] *See, e.g.*, Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 1522 UNTS 3, 26 ILM 1550 (1987); Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 ILM 22 (1998) (draft version), *available at* <http://www.unfccc.de/> (final version). These agreements contain what Ago characterized as "obligations of result."

[75] International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, Art. 2(d), 660 UNTS 195; *see also* Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988), 28 ILM 291 (1989) (duty to ensure full enjoyment of human rights to all within territory).

Perhaps the most dramatic contemporary example of the challenges in applying the ILC's rules of attribution—and their potentially limited role in relation to relevant primary rules—is posed by the question of potential state responsibility for Al Qaeda's actions connected with the September 11 terrorist bombings. Several articles might be relevant, such as Articles 5 (persons exercising elements of governmental authority), 8 (conduct directed or controlled by a state), and 11 (conduct acknowledged and adopted by a state). However, whether any of these articles applies would depend upon an inquiry into murky underlying facts. Responsibility seems more likely to arise through the operation of primary rules, such as customary or conventional rules prohibiting aggressive uses of territory or harboring terrorists, and binding Security Council resolutions.[76]

Criminal Responsibility

Throughout the articles' long history, perhaps more ink was spilled over the issue of state crimes than any other.[77] This debate often produced more heat than light.[78] Some considered it important for the Commission's rules to reflect that not all violations of international obligations are of equal consequence. Certain types of conduct, the violation of certain rules, are profound matters and should be recognized as such. Those on the other side argued that the proposed civil-criminal distinction had no clear foundation in international law, nor much operational significance, as the consequences proposed for more grievous varieties of breaches did not differ greatly from those foreseen for ordinary breaches.

As work on the articles reached its final stages, the gap between the camps narrowed. There was considerable agreement that not all violations of primary rules are alike, accompanied by growing acceptance that the articles should somehow reflect this distinction, albeit perhaps not through the disputed vocabulary of "crimes of states."[79] Finally, some recognized that certain obligations involve community rather than individual interests, and that a broader range of states, not simply a single state suffering particularized injury, should be able to invoke them.

[76] *See, e.g.,* SC Res. 1373, para. 2 (Sept. 28, 2001), *reprinted in* 40 ILM 1278 (2001) (prohibiting states from harboring terrorists).

[77] *E.g.*, INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY (Joseph Weiler, Antonio Cassese, & Marina Spinedi eds., 1989); Georges Abi-Saab, *The Uses of Article 19*, 10 EUR. J. INT'L L. 339 (1999); Alain Pellet, *Can a State Commit a Crime? Definitely, Yes!* *id.* at 425.

[78] The debate proceeded on various levels, of both substance and rhetoric, but generally without reference to contemporary legal scholarship in other areas. Recently, some scholars have suggested that the most fundamental difference between civil and criminal liability may be that between pricing and prohibiting. *See, e.g.*, John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—and What Can Be Done About It*, 101 YALE L.J. 1875 (1992). From this perspective, even without Article 19, the regime of state responsibility seems in some respects more akin to criminal than to civil responsibility. Civil law addresses behavior that has both social costs and benefits, with the goal of deterring rather than prohibiting conduct, through pricing of instances where the costs of the behavior outweigh its benefits. Criminal law, in contrast, seeks to prohibit certain behavior completely. Determining which paradigm fits international law is difficult, but its characterization of conduct as "unlawful" and its focus on cessation, restitution, and *pacta sunt servanda*, rather than on money damages, suggest that international law seeks to prohibit, rather than to price, conduct. *See* Shelton, *supra* note 14. Of course, international law lacks notions of punitive damages or punishment—two mechanisms commonly used by the criminal law to deter illegal conduct. However, it does employ other deterrent mechanisms more characteristic of criminal than of civil law, namely social stigma and pressure. And, like criminal law, it seeks to influence behavior through education and socialization. All of this suggests that perhaps what needs further development in international law is not a concept of criminal responsibility, as proponents of Article 19 suggested, but of civil responsibility—that is, responsibility for acts that cause injury (and should therefore be compensated for) but are not prohibited. The treatment of injurious acts not prohibited by international law has been the subject of a separate ILC study, the first phase of which was also completed in 2001. International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (Prevention of Transboundary Harm from Hazardous Activities), ILC 53d Report, *supra* note 1, at 366. However, the Commission was not lured by the siren song of law and economics, instead developing a draft that "focused on a regime of prevention. . . . emphasizing risk management, cooperation, and consultation by states." Robert Rosenstock & Margo Kaplan, *The Fifty-third Session of the International Law Commission*, 96 AJIL 412, 416 (2002).

[79] Abi-Saab, *supra* note 77.

In the end, the articles manage only a limited resolution of these long-contested issues. Article 40 defines a general category of "serious breaches of obligations under peremptory norms of general international law"; the commentary suggests that these include aggression, slavery, genocide, racial discrimination, apartheid, torture, and violation of "the basic rules of international humanitarian law" and of the right to self-determination.[80] But Article 41 sets forth only limited consequences for such breaches: states shall cooperate to bring them to an end, and not recognize or help maintain situations resulting from them.[81] Significantly, the state committing the violation incurs no additional obligations as a result of committing a serious breach of a peremptory norm; the additional consequences pertain to other states. At this stage in the development of international law, the Commission could not articulate more extensive propositions regarding the special consequences of grave breaches of international law, leaving the matter to be clarified through future practice.

Consequences of an International Breach

Commentators have sometimes contrasted an obligation- and a rights-based approach to state responsibility,[82] although, since rights and obligations are logical correlatives,[83] whether this is a distinction with a practical difference remains unclear. In any event, the articles are framed in language utilizing both approaches. The breach of an international obligation entails two types of legal consequences: it creates new obligations for the breaching state, principally, duties of cessation and nonrepetition (Article 30), and a duty to make full reparation (Article 31); and it creates new rights for injured states (as well as, in some cases, other states), principally, the right to invoke responsibility (Articles 42 and 48) and a limited right to take countermeasures (Articles 49–53). The obligations of breaching states are set forth in part 2 of the articles, the rights of other states in part 3.

Duties of the breaching state. As developed more fully in Weiss's essay, the articles focus predominantly on the interstate dimension of the international legal system. Although they articulate the secondary obligations of cessation, nonrepetition, and reparation in general language, as obligations of the responsible state for the breach of any primary duty,[84] Article 33(1) characterizes these secondary obligations as being owed to other states or to the international community as a whole. Article 33 acknowledges that states may also owe secondary obligations to nonstate actors such as individuals or international organizations, but only in a savings clause providing that the articles do not prejudice rights accruing directly to a person or entity other than a state.[85]

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

[80] Commentaries, Art. 40, paras. 1, 4, 5. Dinah Shelton's essay suggests reservations about the prominence given to peremptory norms in Article 40. Shelton, *supra* note 14, at 841–44.

[81] At the final stages of its deliberations, the Commission deleted a related provision dealing with damages reflecting the gravity of such breaches. ILC 53d Report, *supra* note 1, para. 49.

[82] *See, e.g.,* CRAWFORD, *supra* note 1, at 25, 38–39.

[83] *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

[84] CRAWFORD, *supra* note 1, at 11 (noting the rejection of proposals for Article 1 to qualify the term "obligation" by "towards another State" or "to an injured State"); *see, e.g.,* Article 12 (breach of an obligation occurs whenever there is nonconforming conduct, regardless of the origin or character of the obligation).

[85] Art. 33(2).

The principal element of progressive development in this area is Article 48, which provides that certain violations of international obligations can affect the international community as a whole such that state responsibility can be invoked by states on behalf of the larger community. This provision picks up on the ICJ's celebrated suggestion in *Barcelona Traction* that some obligations are owed *erga omnes*, toward the international community as a whole.[86] However, the regime established by the articles is communitarian only to a limited degree. Article 48 permits any state to invoke responsibility for such violations without an authorizing community decision. It thus recognizes community rights but does not predicate their assertion on community decisions.

Remedies

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

The basic obligations set forth in part 2—explored by Shelton in much more detail—are to cease the wrongful conduct and in some cases to offer appropriate assurances and guarantees of nonrepetition,[87] and to make full reparation (if possible, through restitution, and otherwise through compensation and satisfaction, in that order of priority).[88] Consistently with their overall philosophy, the articles take a one-size-fits-all approach: subject to an important qualification,[89] the secondary obligations of responsibility are the same, regardless of the gravity of the breach or the subject matter or type of obligation involved.[90] As Shelton observes, the Commission's approach, particularly the primacy given to restitution, manifests the continuing power of *Chorzów Factory*.[91] However, it also reveals the splendid isolation of the ILC—and to some extent international law generally—from developments in other areas of law, where scholars and some courts have sought to elaborate a more nuanced, variegated set of consequences responding to different sorts of breaches in different ways—in some cases, through sanctions, in others through pricing mechanisms.[92]

Countermeasures

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

[86] Barcelona Traction, Light & Power Co. (Belg. v. Spain), New Application, 1970 ICJ REP. 4, 32 (Feb. 5).

[87] Art. 30.

[88] Arts. 31, 35–37. Notwithstanding the seemingly absolute wording of these articles, Crawford argues that they are intended to preserve the ability of claimant states "to elect as between the available forms of reparation. Thus it may prefer compensation to the possibility of restitution . . . . [o]r it may content itself with declaratory relief." CRAWFORD, *supra* note 1, at 44.

[89] Arts. 40, 41.

[90] Although the articles do set forth certain limited consequences for grave breaches of peremptory norms, these consequences pertain to other states (primarily not to recognize as lawful the situation created by the unlawful act), not to the breaching state itself. *See supra* note 81 and corresponding text.

[91] Chorzów Factory (Ger. v. Pol.), 1928 PCIJ (ser. A) No. 17 (Sept. 13).

[92] *See* Calabresi & Melamed, *supra* note 63; Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

Substantively, countermeasures may be used only to induce a state to cease a wrongful act and to make reparations; they must be commensurate with the injury suffered; and they may not affect obligations that benefit individuals or the international community as a whole. Procedurally, the offended state generally must first call on the responsible state to fulfill its obligations, notify it of any intention to take countermeasures, and then suspend the countermeasures if the wrongful action has ceased and the dispute is pending before a binding-decision-making body.[93] Bederman's essay speculates on whether these provisions will serve as a "gentle civilizer of nations"[94] by limiting states' resort to countermeasures—and, if so, whether this result would be desirable in view of the lack of strong vertical enforcement in international law.

Dispute Settlement

Particularly during the tenures of Special Rapporteurs Riphagen and Arangio-Ruiz, the Commission was faced with proposals to include substantial dispute settlement machinery in the articles. The first-reading text approved in 1996 included an elaborate hierarchical structure for the settlement of disputes regarding the interpretation or application of the articles.[95] It contained provisions on negotiation, good offices, conciliation, and mandatory arbitration of disputes involving resort to countermeasures, all rounded out by annexes on conciliation commissions and arbitral tribunals. The Commission also considered elaborate proposals for dispute settlement procedures to assess whether an international crime had been committed.[96]

The proposed linkage between resort to countermeasures and compulsory dispute settlement was highly controversial, not least because it permitted a target state to thwart the good-faith use of countermeasures through sham recourse to settlement procedures.[97] Ultimately, the Commission omitted dispute settlement procedures, compulsory and otherwise, from its final text, leaving it to the General Assembly "to consider whether and what form of provisions for dispute settlement [to] include in the event that the Assembly should decide to elaborate a convention."[98]

IV. Issues of Technique

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

Article 25 on necessity as a "circumstance precluding wrongfulness" illustrates both the sorts of judgments that underlie some of the ILC's texts and the powerful effect of these

[93] Art. 52(1), (3).

[94] Bederman, *supra* note 13, at 817 (citing Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960 (2001)).

[95] First Reading Articles, pt. 3 [Arts. 54–60 & Annexes I, II], *reprinted in* Crawford, *supra* note 1, at 362–65.

[96] Robert Rosenstock, *The Forty-seventh Session of the International Law Commission*, 90 AJIL 106, 107 (1996) ("American readers of a certain age may recall the name Rube Goldberg in connection with the proposed mechanism.")

[97] *Cf.* Bederman, *supra* note 13, at 824.

[98] ILC 53d Report, *supra* note 1, para. 60.

texts on the law even before their formal adoption. Like some of the countermeasures provisions discussed by Bederman, the doctrine of necessity as articulated in Article 25 had a bootstrapping quality, helping to shape the law to match the draft.[99]

The existence of a general defense of "necessity" in international law by no means enjoyed universal acceptance prior to adoption of the articles. Basic English-language treatises on international law such as those by Akehurst, Brownlie, Sørenson, and von Glahn did not refer to the doctrine or treated it only in the context of the use of force in self-defense,[100] although some continental writers accepted it more broadly.[101] Moreover, as the commentary points out, the tribunal in the *Rainbow Warrior* arbitration declined to apply the concept as recently as 1990.[102] The arbitral awards and bits of state practice stitched together in the commentary to support the principle of necessity may strike some readers as dated, ambiguous, or otherwise not particularly compelling.[103]

Nevertheless, the principle came into the articles through Ago's work[104] and remained there unscathed through the years. In 1997 the International Court of Justice gave it a powerful boost in the *Gabčíkovo-Nagymaros* case.[105] Focusing on the draft articles, the Court agreed that necessity can preclude wrongfulness under international law, although it declined to apply the principle in the specific dispute.[106] This recognition, in turn, provided sufficient sanction for the ILC to conclude that "[o]n balance, State practice and judicial decisions" justified including necessity in the articles, subject to severe restrictions.[107] Accordingly, to the extent that the ICJ Judgment is cited in support of Article 25, legal development had a circular quality: the ILC's draft helped produce that Judgment. Article 25 thus played an important role in its own validation.

Issues Deferred

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

The articles repeatedly postpone issues in this fashion when they bump up against other systems of international law rules. In these cases, the Commission does not attempt to sort out the consequences, which might often require analysis of primary rules. Instead, it inserts various savings clauses as dividing walls between the different systems, providing that the articles are "without prejudice to" other potentially relevant rules.[108] These clauses sometimes indicate the Commission's desire not to freeze other areas of law that are undergoing change.[109]

[99] *See* Bederman, *supra* note 13, at 819–22 (discussing "feedback loops" between the ILC and the ICJ).

[100] *See, e.g.,* LASSA OPPENHEIM, INTERNATIONAL LAW 298–99 (Hersch Lauterpacht ed., 8th ed. 1955).

[101] *See, e.g.,* 1 CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 141–42, sec. 118 (1970).

[102] Rainbow Warrior (N.Z./Fr.), 20 R.I.A.A. 217, 254, 82 ILR 499, 555 (1990); Commentaries, Art. 25, para. 10.

[103] Commentaries, Art. 25, para. 5. The commentary uses a key authority in an unfamiliar way; Secretary of State Webster's exchange with the British minister following the 1837 *Caroline* incident is invoked to support a necessity defense, even though it is more commonly understood as having to do with self-defense. R.Y. Jennings, *The* Caroline *and* McLeod *Cases*, 32 AJIL 82, 91 (1938).

[104] Roberto Ago, Eighth Report on State Responsibility, [1979] 2 Y.B. Int'l L. Comm'n 51, para. 81, UN Doc. A/CN.4/SER.A/1979/Add.1 (Part 1).

[105] Gabčíkovo-Nagymaros Project (Hung./Slovk.), 1997 ICJ REP. 4, 39–45 (Sept. 25).

[106] *Id.* at 40, 42, paras. 51, 54.

[107] Commentaries, Art. 25, para. 14; *see* Stephen M. Schwebel, *The Influence of the International Court of Justice on the Work of the International Law Commission and the Influence of the Commission on the Work of the Court*, *in* MAKING BETTER INTERNATIONAL LAW: THE INTERNATIONAL LAW COMMISSION AT 50, at 161, 163 (1998).

[108] *E.g.*, Art. 19 (Articles 16–18 are "without prejudice to" a state's responsibility where another state aids or assists, directs and controls, or coerces it in performing a wrongful act). There are clauses with similar effect in Articles 27, 33, 41, 50, 54, 55, 56, 57, 58, and 59. Articles 55 and 56 are "supersaver" clauses, confirming the continued operation of *lex specialis* rules and other legal rules affecting state responsibility.

[109] "[T]he current state of international law on countermeasures taken in the general or collective interest is uncertain. . . . Chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to

As noted above in connection with the rules of attribution,[110] the application of some articles to concrete cases may pose difficult issues of evidence and proof. And in other cases, the legal standards proposed seem deliberately vague and open-ended. These vague formulations perhaps leave room for future development of the law through specific cases, but they leave a great deal to be resolved. For example:

— Article 25 on necessity relies heavily on words of judgment. The commentary freely acknowledges this quality, observing that whether particular interests are "essential" so as to justify the invocation of necessity "depends on all the circumstances, and cannot be prejudged."[111]

— Article 35 provides for restitution unless it results in a burden "out of all proportion to the benefit deriving from restitution."

— Article 38 on interest does not indicate which of several possibilities is "the date when the principal sum should have been paid"—the date the injury occurred or the date the amount of liability was established or liquidated.

The Key Role of the Commentaries

Especially given such ambiguities and the sometimes lean drafting and abstract character of the articles, the commentaries provide vital insights. Most are marked by high quality, although the writers are not immune from the tautologies found elsewhere.[112] A few commentaries are small gems of legal writing.[113] They often identify or at least hint at lurking issues and provide crucial clarifications. The commentaries also present important propositions or qualifications not found in the articles at all. For example, the commentary to Article 16 (on aid or assistance in committing a wrongful act) adds important limitations not contained in the text of the article.[114] The commentary to Article 10(1), on attribution to a state of conduct of an insurrectional movement, adds another significant qualification to the text, warning that the basic rule "should not be pressed too far in the case of governments of national reconciliation."[115]

Like the articles themselves, the commentaries may convey a deceptive degree of clarity and authority. Not surprisingly, they make heavy use of international court judgments and arbitration awards.[116] Such materials can provide clear and focused statements of the law, but there can be room for doubt whether states actually behave the way judges and arbitrators say they should. The commentaries rarely delve deeply into state practice or try to tease out the hazy manifestations of "law in practice."[117]

the further development of international law." Commentaries, Art. 54, para. 6. The Commission was similarly careful in not attempting to list norms regarded as peremptory. *Id.*, Art. 40, para. 6.

[110] *See supra* notes 67–69 and corresponding text.

[111] Commentaries, Art. 25, para. 15.

[112] "There is a breach of an international obligation . . . when such conduct constitutes 'a breach of an international obligation . . .'." *Id.*, pt. 1, ch. III, para. 1.

[113] For example, the commentary to Article 36 is a splendid little essay on key issues in compensation.

[114] Commentaries, Art. 16, para. 3.

[115] *Id.*, Art. 10, para. 7.

[116] The commentaries make substantial use of awards and decisions of the Iran–United States Claims Tribunal; the table of cases in Professor Crawford's excellent volume cites twenty-eight Tribunal awards. CRAWFORD, *supra* note 1, at xv–xxxiii. This confirms the view of the late Professor Lillich and others who have argued that the Tribunal is important in the development of international law, and is not a *lex specialis* backwater. Tribunal awards are cited with particular frequency on attribution issues, since the 1979 Islamic Revolution in Iran was frequently accompanied by exercises of public authority by actors not conforming to conventional conceptions of the state.

[117] *See* INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (W. Michael Reisman & Andrew R. Willard eds., 1988).

V. Overall Assessment

In her Hague lectures, Rosalyn Higgins commented that "[s]tate responsibility is surely a topic of which it can be said that less is more."[118] The ILC has heeded Higgins's advice in significant measure. By focusing only on general, residual rules of responsibility, the ILC took a narrow approach, jettisoning or deferring many difficult and controversial issues:

- fault and injury are left to the primary rules;
- the issue of causation is noted but not addressed substantively;[119]
- the responsibility of states to individuals, international organizations, and other nonstate actors is not directly addressed;
- the rules of attribution deal only partially with the potential responsibility of states for nonstate conduct; most responsibility for such conduct remains to be assessed under the primary rules of obligation; and
- the separate regime of criminal responsibility was ultimately dropped.

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

But the skeptic's perspective sells the articles short. In many situations they will offer a well-considered legal reference point, comfortable for both common lawyers and civilians. Indeed, significant portions of the articles, such as those addressing the legal regime following breach (cessation, restitution, compensation, interest, countermeasures), seem likely to play important roles in the resolution of future disputes. Accordingly, as suggested throughout this symposium, the articles need to be treated with both respect and care, lest they be used mechanically and in ways that do not recognize the legal subtlety and richness often lurking behind deceptively simple texts.

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

For a mixture of reasons,[120] the ILC chose to forward the articles to the General Assembly without recommending the negotiation of a treaty on state responsibility. As a result, whether they accurately reflect existing practice or represent acceptable accommodations of competing interests will not be subjected to the crucible of a diplomatic conference. Instead, at least for the near term, the articles will be tested and perhaps reshaped through the varied processes of application by international legal advisers, scholars, and international courts and tribunals.

[118] Rosalyn Higgins, Problems and Process: International Law and How We Use It 168 (1994).

[119] *See* Commentaries, Art. 31, paras. 9–10.

[120] *See* Caron, *supra* note 11, at 861–66 (indicating the ILC's reasons for recommending that the Assembly simply note the articles).

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

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