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THE ILC'S ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS: A RETROSPECT

By James Crawford*

The development of the articles on state responsibility of the International Law Commission (ILC)¹ has been described elsewhere, in particular in the ILC's *Yearbook*. The phases of development of the first (1955–1996) and second (1998–2001) readings are well enough known, and there is little point in repeating this material.² Whatever the trials and *longueurs* of their production, the articles with their commentaries now exist and may be assessed as a whole.

The first reading was the product of decades of work under successive special rapporteurs (Roberto Ago, Willem Riphagen, and Gaetano Arangio-Ruiz). The second reading was equally a collective process and many members contributed to the final result. As I was formally responsible for shaping the work on second reading, I may not be the best person to comment on the outcome. Anything less than a full-scale defense of the text will be seen as an unauthorized retreat, and if the text cannot defend itself with the aid of the commentaries, it is too late for individuals to make up for any deficiencies.

Nonetheless, some of the reflections in this helpful and timely symposium do call for some comment. Rather than deal with the comments successively, I will do so thematically, focusing on the questions that now seem the most important. As will be seen, these are mostly questions of a general character. Indeed, the symposium is striking for the comparative absence of suggestions as to how particular provisions could have been worded differently—assuming at least that the ILC was correct in limiting the text to issues of state responsibility and to invocations of that responsibility by states, a matter discussed by Edith Brown Weiss and one to which I will return. Furthermore, I agree with much of what is said here—in terms of both the descriptions of what was done and intended by the ILC and, to some extent, the criticisms of what may have been left undone—so that it is possible to be selective.

An initial point should be made, which some of the contributors tend to ignore.³ The ILC process did not occur in isolation. In addition to debates in the literature (some of it appearing in time to be reflected in the text), the Commission received rather regular feedback from

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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, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at <<http://www.un.org/law/ilc>>. The final text with commentary and apparatus is 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 also appear in the Commission's Fifty-third Report, *supra*, will be identified below by article and paragraph number.

² See James Crawford, *On Re-reading the Draft Articles on State Responsibility*, 92 ASIL PROC. 295 (1998); James Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUR. J. INT'L L. 435 (1999); James Crawford, Pierre Bodeau, & Jacqueline Peel, *The ILC's Draft Articles on State Responsibility: Toward Completion of a Second Reading*, 94 AJIL 660 (2000); James Crawford, Jacqueline Peel, & Simon Olleson, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EUR. J. INT'L L. 963 (2001).

³ In his contribution to this symposium, David Caron points out in general terms the interaction between ILC and government representatives. As will be clear from the text, I do not agree with his view that "relatively few governments offered comments on ILC drafts." David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AJIL 857, 865 (2002).

governments, through the Sixth Committee and otherwise. It is true that the forms of discussion fell short of consultation processes adopted by national law commissions, and of course the ILC's consultations were not necessarily representative. But they were not negligible. The draft articles in the course of their development were subjected to several hundred oral comments in the Sixth Committee (most of them informally made available in writing), as well as many hundreds of pages of written comments, published by the United Nations Secretariat. Altogether, the process of comment and feedback during the second reading was, relatively speaking, substantial. Several articles owe their language, and in a few cases even their existence,⁴ to comments of governments. Where suggestions were rejected, reasons were given. Over and above the specific points on drafting, the comments conveyed a sense of the sustainable balance of the articles as a whole, which was particularly significant in the latter stages of the work.

More particularly, Article 54 (countermeasures by states other than injured states) was reduced between 2000 and 2001 from a substantive article to a saving clause in response to the general views of governments. The exclusion of any form of punitive or "exemplary" damages (as at one stage envisaged for Article 41) resulted from nearly unanimous criticisms of governments; this decision helped to consolidate the ILC's view that former Article 19 (international crimes of states) should be deleted.

On the positive side, there was widespread support in the Sixth Committee and in written comments for such matters as the retention of the articles on countermeasures; the distinction between injured and other states (Articles 42 and 48); the simplification of former chapter III of part 1 on breach; and the concept of invocation as the key organizing idea in chapter I of part 3. The final balance struck in the chapter on countermeasures owed much to government comments, as well as the decision to retain chapter IV of part 1 dealing with responsibility of one state for the conduct of another, despite the criticism (arguably justified) that it did not form part of the secondary rules of responsibility.

These government comments and statements (many of them expressed by legal advisers in the regular week for their attendance in New York) formed part of a process of feedback that paralleled and indeed overshadowed the less direct and more subtle "feedback loop" with the International Court of Justice.⁵ Such opinions cannot simply be manipulated. The fact that government comments were carefully taken into account may well have played a role in the relatively benign reception of the articles by the Sixth Committee at the fifty-sixth session of the UN General Assembly in October 2002, and in the rapid adoption of the Assembly's Resolution 56/83. Of more than fifty governments⁶ that expressed views in the debate, only two (Mexico and Guatemala) made criticisms of such a kind as to imply rejection of the ILC's proposals—and they did so in terms of a preference for an immediate diplomatic conference rather than outright rejection of the text. Neither of these possibilities, however, stood any chance of acceptance by the Sixth Committee, and there was little support even for a deferral of a resolution to the following year. As the editors of this symposium, Daniel Bodansky and John Crook note, Resolution 56/83 leaves open the question of the form of the articles, in accordance with the ILC's recommendation.⁷ It annexes the articles (the term "draft" is deleted) and commends them to the attention of governments. The General Assembly did no less (and no more) than the ILC had hoped, and did it with remarkable promptness.

⁴ *E.g.*, Article 53 (termination of countermeasures), which was first suggested by France in 1999.

⁵ See the contribution to this symposium by David Bederman for this process as it affected the articles on countermeasures. David J. Bederman, *Counterintuiting Countermeasures*, 96 *AJIL* 817 (2002). In fact, government comments on the countermeasures articles were of greater significance than the Court's statements, useful as the latter were in providing support and occasional language for the text.

⁶ Fifty-two statements were made. Two of these were made on behalf of groups of states (Norway on behalf of the Nordic Group, and South Africa on behalf of the Southern African Development Community (SADC)).

⁷ Daniel Bodansky & John R. Crook, *Introduction and Overview*, 96 *AJIL* 773, 773, 790 (2002).

Against this background, I propose first to mention certain issues regarding the content of the articles, and then, at rather greater length, to discuss some of the questions raised about their character and future.

I. THE CONTENT OF THE ARTICLES

The Distinction Between Primary and Secondary Obligations as an Organizing Device

An initial point concerns the distinction between primary and secondary obligations as the central organizing device of the articles. This approach, of course, goes back to Ago, and (uniquely) he is cited in the commentary by name, and his own expression of the distinction quoted with approval: “[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.”⁸ To be precise, the key idea is that a breach of a primary obligation gives rise, immediately by operation of the law of state responsibility, to a secondary obligation or series of such obligations (cessation, reparation . . .). The articles specify the default rules that determine when a breach occurs and, in general, the content of the resulting secondary obligations. In their final form they also specify what other states may do to invoke responsibility, by claiming cessation or reparation or, in default, by taking countermeasures.

The distinction is subjected to an illuminating critique by the editors of this symposium. They note that the category of secondary rules is said to comprise—like the common law rules of civil procedure—“a distinctive set of rules that apply across the various substantive areas of law.”⁹ But they suggest that the distinction is confusing and may even be illusory.

Admittedly, the distinction between the content of a substantive obligation and the consequences of the breach of an obligation does not entail that the legal system in question *has* any general (“trans-substantive”) rules of responsibility. To pursue the analogy with the common law approach to civil procedure, it might be that a legal system resolved the problem of the consequences of breach by allowing a claimant, as it were, to assert the breach and the (hypothetical) tribunal to sort out remedies on an ad hoc basis, case by case. If in the course of time categories of cases arose, they would probably be experiential, not general. In that event, even if the forms of action were subsequently abolished and apparently general legal ideas about civil obligations began to flourish in the law schools, we might still find the forms of action ruling from behind the scenes.

Whatever the position concerning the development of the common law of tort and crime,¹⁰ I do not think this example corresponds to the development of the international law of responsibility. Whether the original imperative was natural law or the sanctity of promises, there seems to be no trace of a formulaic approach to responsibility in early international law. Neither natural law nor treaty practice distinguished some specific domain where responsibility for breach applied, as compared with others where it did not. Rather, there emerged a general conception of the rights and duties of states, and of the consequences of breaches of those rights.¹¹ No doubt, rights and duties could be developed by treaty or custom in particular ways for particular states; so, too, might the range of available responses to noncompliance. To this extent, the distinction between primary and secondary obligations was, and

⁸ Commentaries, para. 2 (quoting Roberto Ago, Second Report on State Responsibility, [1970] 2 Y.B. Int'l L. Comm'n 177, 306, UN Doc. A/CN.4/SER.A/1970/Add.1).

⁹ Bodansky & Crook, *supra* note 7, at 780 n.51.

¹⁰ For an account in the field of civil obligations, emphasizing the interweaving of theory and practice, see DAVID IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS (2001).

¹¹ Ian Brownlie, *Causes of Action in the Law of Nations*, 1979 BRIT. Y.B. INT'L L. 13, is an exercise in classification, not historical exegesis.

is, somewhat relative. A particular rule of conduct might contain its own special rule of attribution, or its own rule about remedies. In such a case, there would be little point in arguing about questions of classification. The rule would be applied and it would normally be treated as a *lex specialis*, that is, as excluding the general rule.

But if the distinction is somewhat relative, it was all the same enormously useful in defining the scope of the articles. Indeed, it provided the key to their completion as well as their scope. It may be supported by a number of reasons, principled as well as pragmatic.

The first, historical point is that it provided a way out of the impasse into which the ILC was led in the 1950s by the work of the first special rapporteur, F. V. García-Amador. Although the field of injuries to aliens and their property was and remains important, achieving any consensus on it at the time would have been impossible—as became clear on the only occasion García-Amador's work was debated.¹² Clearly, a strategic retreat was called for.

This quasi-political consideration, however, was not the main point, and the retreat from one area paved the way for a major advance. Ago's distinction responded to what the ILC commentary now refers to as the principle of independent responsibility.¹³ There is no international legislature. Treaties are not statutes of general application. There is no possibility of codifying the substantive international law of obligations in a general way. It could only be done in specific fields (e.g., the law of the sea) by considerable effort, and all such codifications will be partial by definition, as is the UN Convention of 1982. One cannot tell states, comprehensively, what obligations they are to have. In specific fields, codification of a kind has proved valuable, but on analysis these fields involve numerous relatively standardized transactions that occur on a regular basis and are regarded as matters of obligation (e.g., diplomatic and consular relations), or collective values of conformity with certain common standards in order to ensure orderly interaction (e.g., the law of the sea), or some other feature that calls for coordinated multilateral treatment. Many parts of international law do not fall into these categories. For example, in the field of economic relations there is no reason why rights and obligations should not be differentiated, and they certainly are, notwithstanding the World Trade Organization. Even in certain fields where the underlying values may be thought to be universal (e.g., human rights), in fact a large and increasing number of instruments, global, regional and bilateral, has developed, imposing a range of obligations. These cannot be replaced by a single text, and there would be no point in the ILC's compiling them, even if it had the resources.

There was a more subtle point still. To focus on the substantive law of state responsibility in the field of diplomatic protection was to give that area priority. It might have been thought to imply that international law contains subareas where the principle of responsibility applies (as with contracts and delicts) and other areas where it does not, or at least does so only to the extent specified (as with the tort of breach of statutory duty in the common law). On that basis, whole areas of international law would have been seen as containing merely directive principles, or at best as reflecting some analogy with public law, which could be enforced only by reprisals (a sort of decentralized criminal law) and not by claims of responsibility. No doubt, merely directive principles, or regulations noncompliance with which does not produce responsibility, are possible.¹⁴ But there is no presumption that international obligations

¹² [1957] 1 Y.B. Int'l L. Comm'n 154–68, UN Doc. A/CN.4/SER.A/1957 (413th–416th meetings).

¹³ Commentary to pt. 1, ch. IV, para. 1.

¹⁴ Article 102 of the UN Charter says that treaties and international agreements entered into by member states "shall as soon as possible be registered with the Secretariat." It has never been suggested that noncompliance with Article 102 produces responsibility. Compare, however, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1282 (Bruno Simma ed., 2d ed. 2002): "Art. 102 contains an absolute obligation on UN members and does not have a discretionary character. . . . Art. 102 must not be misunderstood as a mere provision setting out the conditions under which an international agreement may be invoked before an organ of the UN" (footnote omitted). This text fails to discuss the consequences of noncompliance, other than the inability to invoke the treaty or agreement before any organ of the United Nations.

in any field are of this character. In theory and in practice, the international law of responsibility is applied across the field of international obligations. It comprises areas that—in terms of domestic analogies—may be seen as like those of contract and tort, and others that might be seen as analogous to public law. But the “public” and the “private” are indistinguishable; the treaty is an undifferentiated instrument, and so is the law of responsibility. Thus, Ago’s move to a set of articles dealing with secondary obligations associated with breach was a step in the direction of profitable generalization. In principle, it reflected the situation as it had developed in international law.

Bodansky and Crook go on to suggest that the ILC may have been inconsistent in treating the rules of attribution as “secondary,” while the issue of fault or damage as a prerequisite to responsibility was treated as “primary”:

One could just as well argue . . . 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).

. . . .

. . . 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.¹⁵

But of course the articles are not a repository for all *possible* secondary rules. Admittedly, if international law had a rule that, despite conduct apparently inconsistent with an international obligation, actual damage had to be shown before responsibility arose, this could be properly classified as a secondary rule.¹⁶ The common law has such a rule for negligence but not for breach of contract; it therefore has no general rule requiring damage for responsibility. In international law, there are rules whose purpose is to prevent actual damage to the state or its nationals. But there are also rules of conduct that are independent of actual damage, and even certain rules where the eventual occurrence of damage is in principle unknowable and untraceable to any given breach (e.g., wrongful emission of chlorofluorocarbons). From an undifferentiated base, international law has to perform—or attempt to perform—all the different functions that developed legal systems perform. It may or may not do so with eventual success, but it cannot be prevented a priori from the attempt. It is not the function of the law of state responsibility to tell states what obligations they may have.

By contrast with the rules relating to damage, the rules of attribution set out in part 1, chapter II seem to have no rival of a general character. Whatever the range of state obligation in international law, the ways of identifying the state for the purposes of determining breach appear to be common, and only in exceptional cases (e.g., Article 1 of the Convention Against Torture¹⁷) may special rules of attribution be devised. In the absence of express provision

¹⁵ Bodansky & Crook, *supra* note 7, at 781 (footnote omitted).

¹⁶ Certain French authors, e.g., BRIGITTE STERN, *LE PRÉJUDICE DANS LA THÉORIE DE LA RESPONSABILITÉ INTERNATIONALE* (1973), have argued for such a general rule, as did France in its commentaries on the draft articles. In truth, however, the range of possible situations of breach escapes classification in terms of any noncircular definition of “damage,” as the *Rainbow Warrior* arbitration showed. *Rainbow Warrior* (NZ/Fr.), 20 R.I.A.A. 217, 266–67, paras. 107–10 (1990).

¹⁷ Article 1(1) provides:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1460 UNTS 112 (emphasis added).

to the contrary, a given obligation (in general terms) will be interpreted as an obligation on the state to do that which conduces to the performance of the obligation. Rarely (and never, as far as I am aware, by implication) is the state taken to have guaranteed the conduct of its nationals or of other persons on its territory, even when it has entered into obligations in completely general terms. The rules of attribution are thus an implicit basis of all international obligations so far as the state is concerned.

It results from this analysis that the distinction between primary obligations and secondary rules of responsibility is to some extent a functional one, related to the development of international law rather than to any logical necessity. Since the ILC was not engaged in posterior analytics, that does not seem to be much of a criticism.

The Lex Specialis Principle and the Issue of Self-Contained Regimes

As this discussion shows, to some extent the classification of a rule of responsibility as secondary or not is linked to the issue of its generality. The articles are aimed at specifying certain *general* rules concerning the existence or consequences of the breach of an international obligation. This qualification is assured by Article 55, which provides: "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."¹⁸

Article 55 is located in part 4 and it potentially applies to any article in parts 1, 2, or 3. The phrase "the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State" succinctly summarizes the content of parts 1–3. In addition, Article 56 makes it clear that the articles are not intended to constitute a code of the secondary rules.

Again, this is the subject of illuminating comment by the editors. They note:

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. 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—which can be used in a more precise way to pursue a complex range of community goals.¹⁹

I think it is true that the articles "presume that international law is a unified body of law." But this "unification" can be understood only in a limited sense. For example, the articles do not presume that conflicts of obligations cannot occur. The ILC discussed whether to address conflicts of obligations, for example, in terms of their effect on the content of the secondary rules of reparation, and decided that the issue could not be resolved by any general formula.²⁰ Instead, the formulation of the forms of reparation was made somewhat more flexible, for this and other reasons.

Thus, states may well have valid but conflicting international obligations to different states at the same time—a possibility not excluded by the rules of the Vienna Convention dealing

¹⁸ Art. 55 ("*Lex specialis*").

¹⁹ Bodansky & Crook, *supra* note 7, at 781 (footnotes omitted).

²⁰ James Crawford, Second Report on State Responsibility, UN Doc. A/CN.4/498, para. 9 (1999) [hereinafter Crawford, Second Report]; Report of the International Law Commission on the Work of Its Fifty-first Session, UN GAOR, 54th Sess., Supp. No. 10, paras. 82–86, UN Doc. A/54/10 (1999).

with the relations between treaties.²¹ Such conflicts, according to many theorists, cannot occur in integrated legal systems governed by the rule of law. If they can occur in international law, that may indicate that it is not such a legal system—but not that it is not some kind of legal system of the international community as a whole, and of states members of that community *inter se*. In this sense at least, it is a unified legal system.

Beyond this point, the degree of unification or conflict in the international system is both a political question and (in relation to existing regimes) a question of interpretation. In my view, there cannot be, at the international level, any truly self-contained regime, hermetically sealed against bad weather.²² But this is not a question on which the articles needed to take a position. A genuinely self-contained regime would be a special *lex specialis*, a *lex specialis* to the nth degree. As a general matter, if states wish to create such a regime (still governed by international law), there seems to be nothing to stop them.²³

But these questions are essentially theoretical. What is perfectly clear is that there can be many variants on the *lex specialis* option, from rather minor deviations up to the (nearly) closed system. As noted already, whether any particular rule operates in derogation from the default rules in the articles is a matter of interpretation: the articles lay down no presumption in favor of the general at the expense of the particular. According to the commentary, it is for the special rule to determine the extent of exclusion, the test being whether there is “some actual inconsistency . . . or else a discernible intention that one provision is to exclude the other.”²⁴

In light of these considerations, it seems to me inaccurate to describe the articles as adopting “one-size-fits-all” rules.²⁵ On the contrary, with the qualifications made above, the tailoring seems to me as flexible as the rules of interpretation. No doubt, one cannot specify the *results* of that process—but at least the relation between the general and the special seems to be right as a matter of principle.

The Concept of Invocation of Responsibility: Part 3, Chapter I

A number of the participants in the symposium note the deletions and simplifications made in the articles in the process from first to second reading.²⁶ They place less emphasis, perhaps, on the additions, among which by far the most important is chapter I of part 3, dealing with the invocation of responsibility.

On first reading, issues of the consequences of a breach were mixed up with issues of entitlement to invoke responsibility, especially in draft Article 40. Under the form of a definition of “injured State,” this article managed to confuse and conflate issues of the consequences of a breach in an irremediable way.²⁷ It may be true, as Weiss notes, that in respect of some breaches of international obligations all states can be considered as in some sense

²¹ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Arts. 40–41, 58–59, 1155 UNTS 331, none of which are contained in the section on the validity of treaties.

²² It is often argued that the European Union is such a regime, and in good weather so it may be. But the underpinnings of EU law still seem to be international treaties ultimately functioning as such. *See, e.g.*, Trevor C. Hartley, *International Law and the Law of the European Union—A Reassessment*, 2001 BRIT. Y.B. INT’L L. 1.

²³ Except a peremptory norm of general international law. A group of states could not allow themselves, behind the walls of a self-contained regime, to enslave or torture people. Presumably, all self-contained regimes are subject to this limitation (in which case they are not self-contained). *See also* Commentaries, Art. 55, para. 2.

²⁴ *Id.*, para. 4.

²⁵ Bodansky & Crook, *supra* note 7, at 781.

²⁶ Outright deletions were draft Articles 2, 11, 12, 13, 19, 20, 21, 23, and part 3 (settlement of disputes). CRAWFORD, *supra* note 1, at 343–45. For the evolution of other articles, see *id.* at 315–38.

²⁷ *See* James Crawford, *The Standing of States: A Critique of Article 40 of the ILC’s Draft Articles on State Responsibility*, in *JUDICIAL REVIEW IN INTERNATIONAL PERSPECTIVE: LIBER AMICORUM IN HONOUR OF LORD SLYNN OF HADLEY* 23 (Mads Andenas ed., 2000).

“injured.”²⁸ But the notion of legal injury in such cases conflicts with the natural sense of “injury,” i.e., harm, material or moral, suffered by the victim as obligee or beneficiary of the obligation breached. Moreover, in the actual context of international relations, the effect of conferring singular or individual rights upon states arising from a breach of a multilateral obligation would tend to be either to treat those states as proprietors of the right (which they are not), or to give undue preference to subjective feelings of affront. As the commentaries note, Ethiopia and Liberia were not individually injured by apartheid in South West Africa; those injured were the people of South West Africa as a whole.²⁹ The International Court said so expressly in its *Namibia* opinion.³⁰ It may be that Ethiopia and Liberia were in some sense injured qua former members of the League of Nations, but such a broad and generic definition of injury does not help: it aggregates what should be disaggregated, and it continues to follow a misleading private-law analogy in the field of responsibility when what was involved in that case, if it was an obligation at all, was the most public of possible obligations. Thus, a vital distinction sets individually injured states (Article 42) apart from those which, while not individually harmed, should be considered to have a legal interest in compliance with the obligation. Articles 42 and 48 seek to make that distinction.

In fact, although there were disagreements over terminology (use of the phrase “interested State” in Article 48 was vigorously and successfully resisted by Bruno Simma), in the end few members of the ILC disagreed on the substance of the two articles. Much the same was true of the comments of governments in 2000 and 2001.

Weiss suggests that “by keeping the definition narrow, the Commission may have intentionally left undisturbed the right of ‘non-injured states’ to make less formal claims that a state has breached its international obligations, as well as any rights of individuals and nonstate entities to make less formal claims.”³¹ In fact, the articles do not cover the question of invocation of responsibility by nonstate entities, although Article 33 expressly reserves that possibility; I will return to this issue below.

As to states, it is true that the articles intentionally left open the possibility that third states (neither “injured” nor “interested” in the sense of Article 48) might nonetheless remind a defaulting state of its obligations. This would be in effect a diplomatic form of “solidarity measure,” not covered by the saving clause in Article 54. It is expressly referred to in the commentaries, which note that

[t]here is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal, or even the taking of countermeasures.³²

In practice, protest and similar measures may be called for, irrespective of any issue of responsibility, so as to preserve possible rights in the same or analogous cases, or indeed to preserve the effect of the underlying rule (the state as legislator rather than claimant). There is thus a range of possibilities, which accounts for a degree of complexity in the formulations.

²⁸ See the contribution to this symposium by Edith Brown Weiss, *Invoking State Responsibility in the Twenty-first Century*, 96 AJIL 798, 802–03 (2002).

²⁹ Commentaries, Art. 48, para. 11.

³⁰ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16, 56, para. 127 (June 21).

³¹ Weiss, *supra* note 28, at 800.

³² Commentaries, Art. 42, para. 2 (footnotes omitted).

On the other hand, each of the cases envisaged is distinct and justified in its own terms, and no further simplification of the categories seemed possible.

Countermeasures and Dispute Settlement: Part 3, Chapter II

If the distinction between different forms of legal interest or injury was the focus of debate concerning chapter I of part 3 in the ILC session of 2000 but was largely settled, the balance of the countermeasures articles remained controversial throughout. Whether the right balance was struck remains to be seen, although David Bederman's account seems cautiously positive. In his words:

[T]he primary thrust of these provisions is to superimpose procedural values of rectitude and transparency on states' assessments of countermeasure options, even while incorporating some ambiguities that may constrain such behavior. Ironically, the overall effect on the international legal process of the Commission's approach may be to permit more aggressive forms of countermeasures.³³

The risk of legitimizing countermeasures by regulating them was a very present factor in the ILC debates, and I must confess that if a separate chapter on countermeasures had not been included in the first-reading text, I doubt that I would have proposed it on second reading. Pragmatically, it might have seemed a bridge too far. But it is one thing to advance across a wobbly bridge and quite another, having crossed it, to decide to retreat. In this context, it must be remembered, first, that countermeasures were always intended by Ago and seen by the ILC as an integral part of the law of responsibility; second, that proportionate countermeasures can constitute a circumstance precluding wrongfulness and that the concept thus had an indisputable place in chapter V of part 1; and third, that a clear majority both of the ILC and of the Sixth Committee favored the retention of a separate chapter. No doubt, the third factor was influenced by the first and second. But in any event the outcome has so far been deemed broadly acceptable.

While not disagreeing with this judgment, Bederman raises three issues of the effect of the countermeasures articles.

First, he is critical of the use of the term "commensurate" in Article 51. That word, as he notes, was used by the International Court in the *Case Concerning the Gabčíkovo-Nagymaros Project*,³⁴ and was adopted by the ILC in place of the double negative of the first-reading text, "not out of proportion." Bederman reads into the change a rather drastic change in the scope of countermeasures:

The use of countermeasures for purely punitive reasons—without any hope or expectation that the malefactor state will actually back down from its offensive conduct—appears to be now precluded by the articles. This change in emphasis on the nature and purpose of countermeasures likewise places in some doubt the Commission's use of earlier international law sources.³⁵

To be sure, reprisals or countermeasures have occasionally been abused "for purely punitive reasons." But governments (whether or not they favored former Article 19) were overwhelmingly opposed to any form of punitive measure in the field of responsibility, and this was as much the case for the purposes of part 3 of the articles as for the purposes of part 2. At no stage did the ILC countenance the use of countermeasures for purely punitive purposes, but neither do any of the modern arbitral or judicial decisions.³⁶

³³ Bederman, *supra* note 5, at 819.

³⁴ *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), 1997 ICJ REP. 7, 56, para. 85 (Sept. 25).

³⁵ Bederman, *supra* note 5, at 822 (footnote omitted).

³⁶ Not even the tribunal in the *Naulilaa* arbitration, which nonetheless proceeded on the assumption that forcible countermeasures were lawful at the time. *Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa* (Port. v. Ger.), 2 R.I.A.A. 1011, 1027–28, 4 ILR 526, 527 (1928).

However, several points of explanation are necessary. First, in using the phrase “commensurate,” the International Court did not intend to contradict the decision of the tribunal in the *Air Services Agreement* arbitration (which it had already relied on) to the effect that the underlying principle can be taken into account in the overall balance.³⁷ In the words of the commentary, it is legitimate to take into account “the importance of the interest protected by the rule infringed and the seriousness of the breach.”³⁸ Second, the reference to “purely punitive” countermeasures tends to confuse the issues of subjective motive and justification. The motivations of governments are notoriously difficult to assess: a countermeasure may be disproportionate even when the government has no ulterior motive, and proportionate even if the intention was to harm. Conversely, the mere fact that the target state declares itself unmovable on the issue does not preclude the injured state from taking countermeasures. Countermeasures are not to be directed only at the fainthearted. Rather, the standard is objective, taking into account the rights of the states affected, including the injured state. And third, proportionate countermeasures may be taken to ensure not only cessation, but also reparation in accordance with part 2.

With these qualifications, I do not think that modern international law allows purely punitive countermeasures, or that the shift (if it was a shift) in the Court's language from proportionality to commensurability was intended to produce any change in the law in that regard. In the passage cited, the Court actually used the term “proportionate,” which is also the title to Article 52. The advantage of the synonym “commensurate” is that it helps to stress the element of qualitative equivalence, which was such an important factor in the *Gabčíkovo-Nagymaros* case itself.

A related issue concerns escalation. On the one hand, this is a major difficulty with countermeasures. Often, measures taken by one side produce still further measures on the other, and the dispute is exacerbated. The articles were formulated with this difficulty in mind, in an attempt to limit escalation. But, on the other hand, they do not envisage a purely static situation. Evidently, the injured state must take into account the response of the target state, both initially and subsequently, and the imposition of countermeasures in stages was never meant to be excluded, provided always that the other conditions for countermeasures, especially proportionality, are met at the time they are taken and for as long as they are taken. Thus, I do not agree with Bederman that the articles exclude “limited forms of escalation . . . , especially in light of the need to ‘induce’ a malefactor state to abide by its international obligations.”³⁹ At the same time, they also provide for de-escalation, both in their emphasis on the reversibility of countermeasures (another lesson from the Court in *Gabčíkovo-Nagymaros*) and in Article 53, requiring termination of countermeasures “as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.”⁴⁰

The two principal controversies during the second reading concerned the procedural conditions for taking countermeasures and the taking of countermeasures by states other than the injured state—that is, by states with a legal interest in compliance, as covered by Article 48.

As to the former, the guiding principles had been usefully set out by the tribunal in the *Air Services Agreement* arbitration.⁴¹ In a world that subjected legal disputes to general and effective international adjudication, including prompt access to effective provisional measures, there would be no room for countermeasures, except possibly emergency interim measures pending resort to the court. Of course, we are far from such a situation in general international

³⁷ *Air Services Agreement* of 27 March 1946 (U.S. v. Fr.), 18 R.I.A.A. 417 (1978) [hereinafter *Air Services Agreement Award*].

³⁸ Commentaries, Art. 51, para. 6.

³⁹ Bederman, *supra* note 5, at 822.

⁴⁰ Art. 53 (termination of countermeasures).

⁴¹ *Air Services Agreement Award*, *supra* note 37, 18 R.I.A.A. at 445–46, paras. 91, 94–96, cited in Commentaries, Art. 52, para. 3.

law, but it does exist in relation to some states and disputes. The issue for the ILC was two-fold: how to establish an appropriate interface between countermeasures and existing dispute settlement obligations, and how to encourage the settlement of disputes as an aspect of the regime of countermeasures. Earlier versions of what became Article 52 were rather rigid and could have been manipulated by a state seeking to avoid its responsibility. In response to the comments of governments, the relevant provisions were progressively modified and simplified, without departing from the basic idea. Although they had been controversial throughout, in their final form they attracted a considerable degree of support from governments, including (but not limited to) those governments which frequently take or threaten countermeasures, and not least the United States itself.

In their final form, the articles allow the immediate taking of urgent countermeasures that may be necessary to preserve the injured state's rights; subject to that, the disputing states are obliged to negotiate and the countermeasures must be suspended if the dispute is effectively submitted to a competent international tribunal. Bederman raises "the problem caused when a tribunal, having once indicated provisional measures, later decides that it does not have jurisdiction over a dispute."⁴² In that case, the dispute would no longer be "pending" before the tribunal in terms of Article 52(3)(b), and the suspension of countermeasures would no longer be required.

More difficult situations, however, can be envisaged. For example, the International Court might refuse to order provisional measures on the sole ground that it finds no appearance, even *prima facie*, of jurisdiction, but nonetheless decline to strike the case from its list.⁴³ There may be a lacuna here. Despite the lack of any prospect of an actual determination on the merits, for the time being the case is still in a sense "pending" before the Court, and it is for the Court, not the parties, to determine whether it has jurisdiction. But since under Article 52(3)(a) the requirement of suspension does not arise unless the wrongful act has ceased, the lacuna (if any) seems to be a relatively minor one. Perhaps it is a tribute that the vice of countermeasures should pay to the virtue of international adjudication, but if so, it is a small and rather contingent tribute.⁴⁴

The issue that caused the most difficulty in the final stages was that of countermeasures taken by states other than the injured state. In 2000, on the basis of a review of rather scanty practice, I proposed an article avowedly *de lege ferenda* that covered both "collective countermeasures" taken at the request of and on behalf of an injured state, and "solidarity measures," that is, measures taken by Article 48 states in (what they perceive to be) the general interest, where there was no individual injured state.⁴⁵ Although the proposal received a degree of support both within and outside the ILC, some governments strongly opposed it. In the end, discretion seemed the better part of valor, particularly having regard to the interaction of these issues with the general mandate of the Security Council. So-called collective countermeasures were dropped from Article 54. "Solidarity measures," as Martti Koskenniemi calls them, are

⁴² Bederman, *supra* note 5, at 826.

⁴³ In its order of July 10, 2002, in *Armed Activities on the Territory of the Congo (Congo v. Rwanda)*, available at <<http://www.icj-cij.org>>, the Court declined provisional measures on grounds of probable lack of jurisdiction, but nonetheless retained the case on the list. There is practically speaking no chance that jurisdiction will be upheld, but meanwhile the dispute is in some sense "pending" before the Court, and it will presumably take some time (up to two years) before a final decision on jurisdiction. Despite many reforms in the Court's practice and procedure, notably under the presidency of Judge Gilbert Guillaume, this example highlights the problem of the absence of any summary procedure before the Court.

⁴⁴ According to the commentary, Article 52(3) "is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures." Commentaries, Art. 52, para. 8. Arguably, where there is not even an appearance of jurisdiction, the court is not in a position to deal with the case on the merits, and the obligation to suspend countermeasures would not apply. In that case, we might say, it is only the dispute over jurisdiction that is "pending" before the court.

⁴⁵ James Crawford, *Third Report on State Responsibility*, UN Doc. A/CN.4/507/Add.4, para. 413 (2000) [hereinafter *Crawford, Third Report*]; *Report of the International Law Commission on the Work of Its Fifty-second Session*, UN GAOR, 55th Sess., Supp. No. 10, at 108–09, UN Doc. A/55/10 (2000).

now dealt with by a comprehensive saving clause, leaving the matter for development in practice. By this stage, the limits even of progressive development of state responsibility had evidently been reached.⁴⁶

At a general level, Bederman asks whether the attempt of the ILC to restrain countermeasures may not produce the paradoxical effect of encouraging them.⁴⁷ It would not be the first time that a decision to regulate some unilateral act in the interests of controlling it produced such unintended effects: both treaty reservations and straight baselines have probably proliferated beyond the expectations of the International Court at the time of allowing them.⁴⁸ But the ILC decided the risk was worth running—and governments in the Sixth Committee broadly supported that view.

II. THE CHARACTER AND FUTURE OF THE ARTICLES

A second group of issues concerns the character and future of the articles. How do they relate to the tradition of international law, and to its future? Inevitably, codification grows out of past experience, with all the limitations that may entail; on the other hand, essays in progressive development may assume a direction to “progress” that proves illusory or ephemeral. The point is touched on in many of the contributions, one way or another.

The Articles as a Product of the Civilian Legal Tradition

An initial question concerns the relation of the articles to distinctively “civilian,” as distinct from “common law” approaches to responsibility. As Bodansky and Crook note, four of the five special rapporteurs on state responsibility were trained in a civil law tradition. Moreover, the ILC's general approach after 1963 was seen from the common law world as rooted in civilian thinking on the law of obligations, and as highly abstract, even arcane. In that respect a contrast was often drawn with the “sound” common lawyer's pragmatism underlying Humphrey Waldock's work on the articles on the law of treaties.

As so often with comparative law generalizations, the contrast seems to me overdrawn. It is true that early influential pronouncements on state responsibility—certainly in the period after 1918—bore the unmistakable stamp of continental European lawyers such as Dionisio Anzilotti and Max Huber, and that this emphasis was highlighted and developed in particular by Ago. On the other hand, civilian lawyers held no monopoly. For example, British and American lawyers were influential in the mixed commissions of this and earlier periods. Referring to one of the earliest major controversies over a subject arguably within the scope of the articles, it is not clear that the disagreements as to “direct” and “indirect” injury that surrounded the *Alabama* arbitration⁴⁹ related to any particular continental schools of thought.

More fundamentally, the general categories of international law—treaty and custom, obligation and breach—were already adapted to a considerable degree to the international state system of the time. No doubt, such thinking as there had been on general principles of responsibility before 1900 was affected by the approach of Justinian's *Digest* and the continental European codes. But this was not the only, or even the most important, influence. Accepted principles of sovereign equality and consent produced a system in which questions of responsibility took the following form: what are the obligations of the respondent state in the given situation, toward whom are those obligations owed, and how have they been breached? Treaties

⁴⁶ See further Martti Koskenniemi, *Solidarity Measures: State Responsibility as a New International Order?* 2001 BRIT. Y.B. INT'L L. 337.

⁴⁷ Bederman, *supra* note 5, at 826, 832.

⁴⁸ Cf. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ REP. 15 (May 28); Fisheries case (UK v. Nor.), 1951 ICJ REP. 116 (Dec. 18).

⁴⁹ 1 JOHN BASSETT MOORE, INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 495 (1898).

were precisely not analogous to statutes of general application—which meant that treaties could themselves be modified or even superseded by subsequent custom or by tacit consent. Diplomatic negotiations usually focused on the proposed rule of conduct rather than on the particular consequences of its (still hypothetical) breach—and this is true whether the context was the neutrality of Belgium, the immunity of ambassadors, the abolition of the slave trade, or the most-favored-nation clause.

Moreover, the content of the law of state responsibility, at least in the important field of injury to the persons and property of aliens, was not based on any codified approach, or even on any general principle of law. It was dependent largely on diplomatic correspondence or decisions of arbitral commissions in relation to particular fact situations. In some respects at least, it resembled the evolution of the common law of torts before *Donoghue v. Stevenson*.⁵⁰ For example, we are still working out the content of the “international minimum standard” on a case-by-case basis—as witness current developments in the application of Articles 1105 and 1110 of the North American Free Trade Agreement and their equivalents in bilateral investment treaties. It is doubtful whether a single generally applicable principle has emerged in that field in whose terms the decisions can be explained.

Other factors are also relevant: a certain convergence of thinking across the common law–civil law divide (at least in Europe);⁵¹ an increased willingness by common lawyers to think in terms of general categories of the law of obligations; and a certain tendency to assume the existence of a single “civilian approach,” whereas on points relevant to the articles, different European countries turned out to approach the matter in quite different ways.⁵²

If there was a criticism to be made of the first-reading articles, it was not that they addressed issues from a civilian (as distinct from a common law) approach but that they addressed non-issues (e.g., the question of “capacity” to breach international law: see former Article 2), or were overrefined (e.g., the negative rules of attribution, all strictly pleonastic), or tried to force substantive rules of international law into a particular form (former Articles 21–26), or used inappropriate domestic law analogies (former Article 19). Each of these issues was addressed on second reading, and the first-reading articles were significantly amended or simply deleted. Comments from governments on these changes did not in any way reflect a civilian–common law divergence, nor did approaches within the ILC itself. I believe the outcome is simpler and cleaner, and that the articles now say more or less what can be said in general terms about the secondary rules of state responsibility. But they are not, if they ever were, to be identified with any particular national legal tradition or school.

The Articles as Limited to an Interstate Approach to International Law

A more serious criticism is that the articles reflect an outdated statist approach to international law, being essentially based on a bilateral state-to-state conception, modified (if at all) only around the fringes. This is a theme explored by Weiss, according to whom the articles “should have done more to recognize the expanded universe of participants in the international system entitled to invoke state responsibility.”⁵³

The suggestion that “more could have been done”⁵⁴ first requires an assessment of what has been done. Weiss cites Article 33(2) but tends to underrate its significance. Article 33 reads in whole as follows:

⁵⁰ 1932 App. Cas. 562 (appeal taken from Scot.).

⁵¹ Although this has been denied. Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT’L & COMP. L.Q. 52 (1996).

⁵² For example, in relation to each of causation, solidary responsibility, and inducing breach of contract. See, respectively, Crawford, Third Report, *supra* note 45, UN Doc. A/CN.4/507, paras. 27–30; *id.*, UN Doc. A/CN.4/507/Add.2, para. 263 n.489; Crawford, Second Report, *supra* note 20, annex (Add.3), *passim*.

⁵³ Weiss, *supra* note 28, at 809.

⁵⁴ *Id.* at 816.

Article 33

Scope of international obligations set out in this Part

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

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

This article (new to the second-reading text) seeks to do two things. Paragraph 1 makes it clear that the secondary legal relationships created as a result of the breach may arise as between the responsible state and one or more states, or the international community as a whole, depending, inter alia, "on the character and content of the international obligation and on the circumstances of the breach." This phrasing avoids any suggestion that the obligations of cessation and reparation, which are dealt with in part 2, are obligations "in the air," that is, obligations without some correlative right of action. As adopted on first reading, part 2 was expressed in terms of the rights of "the injured State," with the inference that for every breach there would be an injured state entitled individually to vindicate its rights.⁵⁵ That did indeed imply a bilateral and purely interstate conception of responsibility, which fitted poorly not merely with such notions as crimes of state (former Article 19), but also with the extended conception of "injured State" in former Article 40. In the new version of part 2, the formulation of the secondary consequences of responsibility in terms of obligations rather than rights was a deliberate step back from a rigidly bilateral conception of injury. At the same time, it required some recognition of the existence of correlative rights of various kinds, hence Article 33(1).

But Article 33(1) could not stand on its own, because it would have implied that all secondary obligations were owed to states or collectives of states, and that nonstate entities could not be directly injured by breaches of international law. Avoiding this implication is the function of Article 33(2). In form a saving clause, it nonetheless clearly envisages that some "person or entity other than a State" may be directly entitled to claim reparation arising from an internationally wrongful act of a state. This provision completes the framework of the subject of the responsibility of states, allowing the full range of possibilities in terms of right-duty relationships and avoiding any negative inferences that might otherwise have been drawn from the decision to deal in detail only with issues of invocation of responsibility by states.

Taken together, the two paragraphs of Article 33 emphasize the variety of situations that may be involved, and the subtlety of possible interactions between states as legislators and actors and nonstate entities as beneficiaries and claimants. For example, a standard bilateral or regional investment treaty is an interstate agreement, to which individual investors are not privy. It is a matter of interpretation whether the primary obligations (e.g., of fair and equitable treatment) created by such a treaty are owed to qualified investors directly, or only to the other contracting state(s). As the International Court rather unobtrusively held in the *LaGrand* case,⁵⁶ an interstate treaty may create individual rights, whether or not they are classified as "human rights."⁵⁷ In this respect, the Court was reaffirming what the Permanent Court had said, equally unobtrusively, in the *Polish Railway Workers* case.⁵⁸ On the other hand, one

⁵⁵ Under former Article 40, there might be some or many injured states, but the implication was that each was separately injured and no provision was made to deal with the situation of a plurality of injured states.

⁵⁶ *LaGrand Case* (Ger. v. U.S.), Merits (Int'l Ct. Justice June 27, 2001), available at <<http://www.icj-cij.org>>.

⁵⁷ *Id.*, paras. 77, 78; cf. Separate Opinion of Vice-President Shi.

⁵⁸ Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 PCIJ (ser. B) No. 15, at 17–19 (Mar. 3), a decision not referred to in *LaGrand*. On the issue as it relates to rights under European Union law, see Derek Wyatt, *New Legal Order or Old?* 7 EUR. L. REV. 147 (1982); Ole Spiermann, *The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order*, 10 EUR. J. INT'L L. 763 (1999).

might argue that bilateral investment treaties in some sense institutionalize and reinforce (rather than replace) the system of diplomatic protection, and that in accordance with the *Mavrommatis* formula,⁵⁹ the rights concerned are those of the state, not the investor. The articles take no position on that question, which involves the interpretation of the primary obligation. However, what Article 33 clearly shows is that the secondary obligations arising from a breach may be owed directly to the beneficiary of the obligation, in this case the investor, who effectively opts in to the situation as a secondary right holder by commencing arbitral proceedings under the treaty. A new legal relation, directly between the investor and the responsible state, is thereby formed, if it did not already exist.⁶⁰ Thus, at some level a modern bilateral investment treaty disaggregates the legal interests that were clumped together under the *Mavrommatis* formula.

True, this acknowledgment, important though it is, was not accompanied by any detailed regulation in the articles of the ways in which state responsibility may be invoked by nonstate entities. This subject could have been brought within the scope of the project, which covered the responsibility of states and was not confined to their responsibility to other states. But there were several reasons for not venturing further. The first-reading articles had not done so, as noted already. The ILC had a compelling interest in completing the project on time, given that it had dragged on for so many years. In addition, the project certainly did not extend to the responsibility of entities other than states. This is a disparate topic: the ILC has just begun its study of the responsibility of international organizations,⁶¹ but that will leave various other issues untouched. The responsibility of nonstate entities for breaches of international law raises novel and difficult questions, and could have given rise to significant controversy. Diplomatic protection had already been carved off from the articles (likewise not having been treated on first reading). Conceptually, it seems that diplomatic protection should be regarded as a form of invocation of state responsibility; but it is at least a distinct form of invocation, which was being separately treated.⁶²

Above all, there was a need not to raise so many new issues that the acceptability of the text as a whole might have been put in question. The frank acceptance in Article 48 of the various ways in which states may invoke responsibility in some general interest, and the clear rejection of the narrow approach to standing adopted by the Court in *South West Africa, Second Phase*,⁶³ taken together with Article 33, amounted to substantial progress, but it was approaching the margins of acceptability for some influential states. For example, the ILC fought off demands by states (and some of its own members) to use the formula "the international community of States as a whole." This phrase would have suggested that only states are members of that community, and might further have implied that issues of international responsibility can only arise as between states. Instead, as the commentaries explain, "the international community as a whole" is a more inclusive category.⁶⁴ In these various ways, the interests and concerns advocated by Weiss were given a textual basis and an explanation, without endangering the economy (or the survival) of the text as a whole.

⁵⁹ *Mavrommatis Palestine Concessions* (Greece v. UK), Jurisdiction, 1924 PCIJ (ser. A) No. 2, at 12 (Aug. 30).

⁶⁰ See also Weiss, *supra* note 28, at 815 (briefly noting this possibility).

⁶¹ See Report of the Working Group on Responsibility of International Organizations, UN Doc. A/CN.4/L.622 (2002), and the debate in UN Doc. A/CN.4/SR.2740 (2002). Professor Giorgio Gaja is the special rapporteur on this new topic.

⁶² See the reports by Special Rapporteur John R. Dugard, First Report on Diplomatic Protection, UN Doc. A/CN.4/506 & Add.1 (2000); Second Report on Diplomatic Protection, UN Doc. A/CN.4/514 (2001); Third Report on Diplomatic Protection, UN Doc. A/CN.4/523 & Add.1 (2002).

⁶³ *South West Africa cases* (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, 1966 ICJ REP. 6 (July 18). The commentary to Article 48, para. 7 n.766 makes it clear that there is a "deliberate departure" from that decision.

⁶⁴ Commentaries, Art. 25, para. 18.

The Authority of the Articles and the Future of the Text

As to the form and potential authority of the text, the various contributions in the symposium adopt different approaches, from Caron's qualified skepticism about the value of the articles to Weiss's criticism that they did not go further. Something needs to be said about the possible future form of the text and the likely authority of the articles if no diplomatic conference is convened.

General Assembly Resolution 56/83 leaves open the question whether a diplomatic conference on the law of state responsibility should be convened. That issue was postponed until the fifty-ninth session of the Assembly in 2004. If a conference is subsequently held and a convention concluded, it will of course substitute for the present text—and will do so whether or not it is successful as a convention. No one now refers, except for comparative purposes, to the draft articles on the law of treaties, any more than to the draft articles on succession of states with respect to property, archives, and debts, notwithstanding that the former is widely regarded as a successful exercise and the latter is not.

If governments do not proceed to a diplomatic conference, it may well be for a similar combination of reasons that led a majority of the ILC to suggest that the adoption of the text by a General Assembly resolution would be sufficient. Some governments might perhaps have difficulties with this or that article because of its implications for some substantive issue in which they were interested. But for the most part a diplomatic conference would require governments to take firm positions on abstract and difficult issues. It may be doubted whether the appetite for such an exercise exists.

Caron notes "the paradox that [the articles] could have more influence as an ILC text than as a multilateral treaty"; in his view, it is "this influence amid controversy that is paradoxical."⁶⁵ I would note that both the influence and the controversy have still to be tested, but that more evidence can be found of the former than the latter. The articles have already been referred to in argument before international tribunals, in arbitral decisions, in state practice, and in separate opinions of the International Court, although the ultimate tests of acceptance have still to be met. At the same time, the level of controversy underlying the final text can also be overstated.

On the assumption that the articles stand as at present, without the further sanction (or dismemberment) that could follow from a diplomatic conference, the question is what their status is likely to be. According to Caron, "The ILC's work on state responsibility will best serve the needs of the international community only if it is weighed, interpreted, and applied with much care."⁶⁶ Speaking for myself, I entirely agree. The articles will have to prove themselves in practice, and that is a process which will require careful assessment. Indeed, the point of the ILC's recommendation, in the first place at least, was to allow such a process of testing and assessment to continue (it had of course started long before) on a case-by-case basis. The same care over time has attended resort to the Vienna Convention on the Law of Treaties, which on almost every occasion where it has been applied by international courts has been applied as customary international law and not by reason of its being a treaty.⁶⁷

This response may be thought rather bland—but it is not clear what other response can be made. Caron identifies, quite accurately, a weakness on the part of many governments

⁶⁵ Caron, *supra* note 3, at 857, 858.

⁶⁶ *Id.* at 873.

⁶⁷ On the rather strict conditions for the application of the Vienna Convention, *supra* note 21, as a treaty, see Article 4. In the *Gabčíkovo-Nagymaros Project* case, *supra* note 34, the Vienna Convention did not apply qua treaty to the 1977 bilateral treaty that was principally at stake in that case; it did apply qua treaty to an amendment of 1989. There is no indication that this made any difference. See 1997 ICJ REP. at 38, para. 46. For the most part, the Vienna Convention has been applied to treaties concluded long before. See, for example, *Kasikili/Sedudu Island (Bots./Namib.)*, Merits, 1999 ICJ REP. 1045, 1059–60 (Dec. 13), applying Article 31 of the Vienna Convention to a treaty dating from 1890.

in dealing with standard lawmaking texts:⁶⁸ that can be seen, for example, from the rather unhappy process that has attended the ILC's articles on jurisdictional immunity of states and their property, now belatedly back on the agenda. The lesson of that and other cases has not been lost on the ILC. Its recommendation on the state responsibility articles paralleled an earlier recommendation concerning the articles on succession of states with respect to nationality, which were likewise annexed to a General Assembly resolution pending subsequent consideration of a possible diplomatic conference.⁶⁹

Constitutionally, the preferable way of handling *any* lawmaking text may be the standard method of a diplomatic conference followed by a treaty that is subject to ratification (or not) by governments. This approach is evidently preferable where the text in question is, for example, the statute for an international criminal court, which imposes itself on individuals and requires due process of law; or, more generally, where the text must be embodied in domestic law to have its effect. This was the case with large parts of the Conventions on Diplomatic and Consular Relations, and would be the case with any eventual product of a diplomatic conference on jurisdictional immunities. By contrast, the secondary rules of state responsibility are only indirectly applicable in national courts, and they do not require legislative implementation. In effect, in such a field the ILC's work is part of a process of customary law articulation, which—as Caron argues—requires care in its recipients but does not contravene any general principle.

⁶⁸ Caron, *supra* note 3, at 865–66.

⁶⁹ GA Res. 55/153 (Jan. 30, 2001), *available at* <<http://www.un.org/docs>>.