

State Responsibility

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A. The Scope of State Responsibility

- 1 State responsibility is a cardinal institution of international law. It results from the general legal personality of every → *State* under international law, and from the fact that States are the principal bearers of international obligations (see also → *States, Fundamental Rights and Duties*). Moreover just as the law of State → *treaties* is applied by analogy to the treaties of other international persons (see also → *Vienna Convention on the Law of Treaties [1969]* ['VCLT']), so State responsibility provides the frame of reference for considering other forms of international responsibility, in particular the responsibility of international organizations (see also → *International Organizations or Institutions, Responsibility and Liability*).
- 2 What amounts to a breach of international law by a State depends on the actual content of that State's international obligations, and this varies from one State to the next. Even under general international law (→ *General International Law [Principles, Rules and Standards]*), which might be expected to be virtually uniform for every State, different States may be differently situated and have different interests: coastal States and distant-water-fishing States (see also → *Fisheries, Coastal*; → *Fisheries, High Seas*), upstream and downstream riparians (see also → *International Watercourses*; → *Water, International Regulation of the Use of*), capital importers and capital exporters (see also → *Investments, International Protection*), etc. They will also have a different range of treaty and other commitments and correspondingly distinct responsibilities. There is no such thing as a uniform code of international law, reflecting the obligations of all States.
- 3 On the other hand, the underlying concepts of State responsibility—attribution, breach, excuses, and consequences—are general in character. Individual treaties or rules may vary these underlying concepts in some respect; otherwise they are assumed and apply unless excluded. These standard assumptions of responsibility, on the basis of which specific obligations of States exist and are applied, were examined by the → *International Law Commission (ILC)* over more than 40 years. They are now codified and developed in the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted on 10 August 2001 ('2001 ILC Articles'; see also → *Codification and Progressive Development of International Law*).
- 4 A number of cognate topics have been the subject of separate work within the ILC. → *Diplomatic protection* is a subset of the field of State responsibility, concerned with espousal by the State of the legal interests of its nationals. The ILC adopted a final set of draft articles on the subject in 2006 (see paras 59–63 below). Responsibility of international organizations is a poorly developed field on which work began in 2001. The ILC also laboured for many years on the barely-existent topic of liability for injurious consequences of conduct not prohibited by international law, something by definition concerned with the content of primary obligations of reparation and thus removed from the classical field of State responsibility (→ *Liability for Lawful Acts*).

- 5 Many individual topics within the field of State responsibility have separate entries in this encyclopedia: they are cross-referenced here and will not be duplicated. Rather this article seeks to provide an overview with special reference to the ILC's work. The 2001 ILC Articles now provide the practical and conceptual structure within which issues of State responsibility, and by analogy the responsibility of other legal persons, can be considered.

B. History of the State Responsibility Topic in the ILC

- 6 Work on State responsibility began in the ILC in 1956 under Special Rapporteur García Amador (Cuba). This early work focused on State responsibility for injuries to → *aliens* and their property (→ *Property, Right to, International Protection*). Although García Amador submitted six reports between 1956 and 1961, there was little discussion of them, in part because of the demands of other topics but also because the debate in 1957 had indicated there was no general agreement as to the way forward. In 1957 the ILC postponed any detailed discussion of García Amador's proposals.
- 7 In 1962 it was proposed to redraw the boundaries of the topic so as to focus on 'the definition of the general rules governing the international responsibility of the State' (UN ILC Special Rapporteur R Ago, 'Report on State Responsibility' [1963] para. 5). By this was meant the rules of general application concerning State responsibility, applicable not only to diplomatic protection but also to other fields. The point was not to elaborate the substantive rules themselves or the specific obligations of States arising from them, but to focus on the framework or matrix of rules of responsibility, identifying whether there has been a breach by a State and its consequences.
- 8 In 1963 the ILC approved this reconceptualization of the topic and appointed Roberto Ago (Italy) as Special Rapporteur. Between 1969 and 1980, Roberto Ago produced eight reports and the ILC provisionally adopted 35 articles constituting Part One of the proposed draft articles: 'Origin of State Responsibility'. The detailed treatment in Part One of the rules of attribution and the general justifications or excuses for an internationally wrongful act was highly influential. Other elements were more controversial, in particular Art. 19 Draft Articles on State Responsibility of 1980 ('1980 Draft Articles') introducing the concept of international—ie State—crimes (see also → *International Criminal Law*), as well as the over-elaborate typology of obligations in Arts 20 to 26 1980 Draft Articles.
- 9 In 1979, Willem Riphagen (Netherlands) was appointed Special Rapporteur. Between 1980 and 1986, he presented seven reports, containing a complete set of draft articles on Part Two—'Content, Forms and Degrees of International Responsibility'—and Part Three—'Settlement of Disputes'—together with commentaries. Owing to the priority given to other topics, only five articles from his Part Two were provisionally adopted during this period. The most important of these was Art. 40 Draft Articles, an extended definition of 'injured State'.
- 10 In 1987, Gaetano Arangio-Ruiz (Italy) was appointed Special Rapporteur. In the period 1988 to 1995 he presented seven reports, enabling the ILC to adopt the text with commentaries on first reading in 1996 ('1996 Draft Articles'). The draft articles of 1996 thus consisted of three tranches, Part One, adopted in the period 1971 to 1980 under Ago, a few articles in Part Two Chapter I adopted in the period to 1986 under Riphagen, and the residue dealing with → *reparations*, → *countermeasures*, the consequences of international crimes, and dispute settlement, adopted in the period 1992 to 1996 under Arangio-Ruiz. There was no reconsideration of earlier articles at any point, so problems of co-ordination existed between the three groups (for a table showing the evolution of the first reading text see Crawford [2002] 315).
- 11 In 1997 the ILC decided to complete the second reading within four years and appointed James Crawford (Australia) as Special Rapporteur.
- 12 Certain key features of the text provided guiding principles for the second reading. The first was its comprehensive coverage of obligations, bilateral and multilateral. Part One 1996 Draft Articles covered questions of responsibility arising from the breach of any international obligation of a State. They were not limited to obligations of States owed exclusively to other States, as distinct from obligations owed to non-State entities, to all States or to the → *international community* as a whole (see also → *Obligations erga omnes*). Second, no distinction was drawn between treaty and non-treaty obligations: international law draws no distinction between responsibility *ex delicto* and *ex contractu*. A third and related feature is the open and generally neutral approach taken by the ILC to the content of the primary rules. As far as possible, no attempt is made to specify the content of the primary obligations of States. In particular there is no separate requirement of → *fault* or wrongful intent for an internationally wrongful act to be held to exist. Nor do the 1996 Draft Articles specify any requirement of injury, damage, or harm to another State for responsibility to arise. Whether these conditions are required depends on the primary obligation, and there is no a priori limit on the content or scope of international obligations. On the other hand the existence of injury, harm, or damage is relevant in terms of the invocation of responsibility and the form and extent of reparation and is referred to in that context.

- 13 At the same time there were unresolved difficulties with the first reading text. The most visible was the controversy over international crimes of State. The existence of obligations towards the international community as a whole was affirmed by the → *International Court of Justice (ICJ)* in the *Case concerning the Barcelona Traction, Light and Power Co Ltd* (at para. 33; → *Barcelona Traction Case*), in a dictum often-quoted and generally accepted. On first reading Arts 19 and 40 (3) 1996 Draft Articles sought to translate that idea by reference to the notion of international crimes of States. These were defined as breaches of an international obligation 'so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the community as a whole' (Art. 19 (2) 1996 Draft Articles). Art. 19 (3) 1996 Draft Articles then provided examples of international crimes 'on the basis of the rules of international law in force', a phrase not found in Ago's original (UN ILC Special Rapporteur R Ago, 'Fifth Report on State Responsibility' para. 155). Apart from the fact that Art. 19 (3) 1996 Draft Articles plainly strayed over the line between primary and secondary rules, there remained a fundamental doubt about what it means to say that a State has committed a crime, especially given that international law had developed the notion of criminal responsibility (see also → *Individual Criminal Responsibility*). There is no example in practice of a State being held criminally liable: the only penalties ever imposed on States after judicial process have been civil penalties or fines within the framework of European Union ('EU') law (see also → *European [Economic] Community*). Strong reservations as to the terminology of 'crimes' were expressed within the ILC and in the comments of many governments, although others continued to support the idea. On the other hand there was no particular difficulty in principle or in terms of the present state of international organization in accepting the idea that some obligations are held to the international community as a whole and not only to individual States, and that grave breaches of those obligations could attract special consequences. The problem was how to translate that idea into the text in a way which would be generally acceptable.
- 14 At least as problematic was Art. 40 1996 Draft Articles, which defined 'injured State' in an unco-ordinated and diffuse way. For example, it equated a State seriously harmed by the breach of an obligation owed to it individually and States individually unaffected but seeking to ensure → *compliance* with an obligation in the general interest. In the ICJ's *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)*, Ethiopia and Liberia were seeking to vindicate a public interest in the due administration of the Mandate (see also → *Mandates*). They were not relying on individual rights of their own. But the ICJ held that the claim was inadmissible precisely because it did not involve individual rights of the claimant States (see also → *South West Africa/Namibia [Advisory Opinions and Judgments]*). It was this narrow approach—a serious lacuna when the direct beneficiary of the obligation is not a State and has no capacity to sue—which the ICJ sought to address in the *Barcelona Traction Case*. But simply to equate the victim of the breach and the third State seeking to vindicate its rights was quite unsatisfactory (see also → *International Courts and Tribunals, Standing*).
- 15 A subtler defect was the presentation of all the consequences of an internationally wrongful act as flowing automatically—by operation of law—from the breach. In accordance with the time-honoured formula developed in the *Case concerning the Factory at Chorzów (Germany v Poland) (Claim for Indemnity) (Merits)* ('*Chorzów Factory Case*'), this is true for the obligation of full reparation, which is as it were an inseparable consequence of the breach and which falls within the jurisdiction of a tribunal empowered to determine the breach (see also → *German Interests in Polish Upper Silesia Cases*). But other consequences such as the taking of countermeasures are not automatic legal consequences of a breach: rather they follow, in some cases, from the failure to make reparation. Responsibility entails reparation, but the claims process requires choices to be made and involves elements of election and response. By wrapping up all the consequences of a breach in one unwieldy part, the 1996 Draft Articles ignored the vital area of invocation.

C. The 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts: An Overview

- 16 These major issues were addressed in the following way on second reading. The notion of international crime of State was discarded, being replaced by 'serious breach of a peremptory norm' (Arts 40 and 41 2001 ILC Articles). A distinction was drawn between the injured State—or, by inference, any other injured entity—and a State seeking to maintain an interest in performance of the obligation independent of any individual injury (Arts 42 and 48 2001 ILC Articles). And a new part was included on invocation, including countermeasures, which were thereby placed in their proper remedial context (see also → *Remedies*).

1. The Internationally Wrongful Act of a State

- 17 Chapter I 2001 ILC Articles sets out certain general principles:

- a) that every internationally wrongful act of a State entails its international responsibility (Art. 1 2001 ILC Articles);
- b) that an internationally wrongful act exists when conduct consisting of an act or omission is attributable to a State and constitutes a breach of an international obligation owed by that State (Art. 2 2001 ILC Articles); and
- c) that characterization of an internationally wrongful act is governed by international law and is not affected by its characterization as lawful by internal law (Art. 3 2001 ILC Articles).

These are well established, even axiomatic. Art. 3 2001 ILC Articles, for example, goes back to the → *Alabama arbitration*: a State cannot rely on its internal law as an excuse for not performing its international obligations.

- 18 Chapter II 2001 ILC Articles deals with the important topic of attribution of conduct to a State. In international law the general rule is that conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation, or control of those organs, that is, as agents of the State (see also → *Representatives of States in International Relations*). Art. 4 2001 ILC Articles states the basic rule that conduct of any State organ is attributable to the State under international law. Art. 5 2001 ILC Articles deals with persons or entities empowered to exercise elements of governmental authority and Art. 6 2001 ILC Articles addresses the situation where an organ of one State is placed at the disposal of another State. Art. 7 2001 ILC Articles provides that conduct by a State organ or person or entity exercising governmental authority acting in that capacity will be considered an act of the State under international law even if it exceeds its authority or contravenes instructions. Arts 8 to 11 2001 ILC Articles deal with additional cases where conduct is attributable, broadly speaking on the analogy of agency, a principle neglected in the earlier ILC work. Art. 8 2001 ILC Articles covers conduct carried out on the instructions of a State organ or under its direction and control, an actual or constructive agency. Art. 9 2001 ILC Articles covers persons exercising elements of governmental authority in the absence of constituted authority, an agency of necessity. Art. 10 2001 ILC Arts deals with the special case of conduct of insurrectional movements, whether seeking to form a new government of the existing State or a new State altogether (see also → *Insurgency*). Art. 11 2001 ILC Articles deals with conduct adopted by the State as its own, either expressly or by conduct, ie with ratification of the conduct of persons acting outside the scope of any agency (→ *Responsibility of States for Private Actors*).
- 19 Chapter III 2001 ILC Articles deals with the breach of an international obligation. Art. 12 2001 ILC Articles defines in general terms when it may be considered that there is a breach of an international obligation, namely when an act is not in conformity with what is required of a State by an obligation. Art. 13 2001 ILC Arts sets out the principle that a State is only responsible for breach of an obligation if the relevant obligation is in force for that State at the time of the breach (see also → *Intertemporal Law*). Art. 14 2001 ILC Arts deals briefly with the practically important notion of continuing breaches of obligations. Art. 15 2001 ILC Arts deals with breaches consisting of a composite of acts, which is significant in the context of breaches of obligations involving systematic conduct, eg → *crimes against humanity* and → *genocide* (see also → *Gross and Systematic Human Rights Violations*).
- 20 Chapter IV 2001 ILC Articles addresses the responsibility of a State in connection with the act of another State—what in internal law is variously described as complicity, aiding and abetting, etc. As with internal law delicts, an internationally wrongful act can result from the collaboration of several States, either by independent conduct of several States, or through a common organ, or one State may act on behalf of another. Art. 16 2001 ILC Articles deals with the provision of aid or assistance by one State with a view to assisting in the commission of a wrongful act by another State. Art. 17 2001 ILC Articles deals with the instance where one State exercises powers of direction and control over the commission of an internationally wrongful act by another State. Art. 18 2001 ILC Articles deals with the more extreme case where one State coerces another into committing an act which constitutes, or would constitute but for the → *coercion*, a breach of the latter State's international obligations. Chapter IV 2001 ILC Articles is, evidently, without prejudice to the international responsibility of the State which commits the act in question, or of any other State; see Art. 19 2001 ILC Articles. This recognizes that the attribution of responsibility to an assisting, directing, or coercing State does not as such preclude the responsibility of the assisted, directed, or coerced State, or any other State—though it may do so in some cases through the operation of the defence of → *force majeure*.
- 21 Chapter V 2001 ILC Articles sets out six circumstances precluding the wrongfulness of conduct which would otherwise not be in conformity with the international obligation of the State concerned, ie general defences or excuses for breach of an international obligation. These are to be distinguished from the grounds for suspension or termination of the obligation itself, eg suspension or termination of a treaty obligation under the law of treaties (→ *Treaties, Suspension*; → *Treaties, Termination*). Unless the underlying obligation terminates, the excuses or defences justify non-performance only for the time being.

22 The six defences or excuses covered in Chapter V 2001 ILC Articles are → *consent* (Art. 20), → *self-defence* in conformity with the → *United Nations Charter* (Art. 21); see also → *United Nations [UN]*, countermeasures in accordance with Part Three Chapter II (Art. 22), *force majeure* (Art. 23), → *distress* (Art. 24), and necessity (Art. 25; see also → *Necessity, State of*). None of these circumstances may be relied on if the relevant wrongful act is a breach of a peremptory norm of general international law (Art. 26). Art. 27 provides that invocation of a circumstance precluding wrongfulness in accordance with Chapter V is without prejudice to compliance with the relevant obligation if the circumstance precluding wrongfulness no longer exists, and also the possibility of → *compensation* for any material loss caused by the act in question.

2. Breach of an International Obligation

(a) General Principles of Cessation and Reparation

23 Certain consequences flow as a matter of law from the commission of an internationally wrongful act without the need for an intermediate claim or act on the part of the injured State or entity. These consequences fall into two categories: the obligation of cessation and non-repetition and the obligation to make reparation. Although cessation and non-repetition have been neglected in the literature, many responsibility claims are more concerned with continued performance than with reparation. In principle a State which is under a specific obligation does not have an option to pay damages in lieu of performance. Indeed in the most successful scheme for implementing State responsibility yet devised—the → *World Trade Organization (WTO)* dispute settlement system—compensation has an entirely subsidiary and marginal role and the core remedy is cessation of the breach (→ *World Trade Organization, Dispute Settlement*). Yet in controverted situations continued performance may be very difficult to achieve, as in the Rainbow Warrior affair, where New Zealand disclaimed compensation but got it anyway, namely in the form of a recommendation from the arbitration tribunal that the parties 'set up a fund to promote close and friendly relations between the citizens of the two countries, and that the Government of the French Republic make an initial contribution equivalent to \$US2 million to that fund' (*Case concerning the Difference between New Zealand and France concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 between the Two States and which Related to the Problems Arising from the Rainbow Warrior Affair* 275; see also → *Rainbow Warrior, The*). How to strike a balance between the affirmation of principle and the retention of sufficient flexibility to allow closure of disputes is a recurring issue.

24 Despite this, the basic principles in Part Two Chapter I 2001 ILC Articles on first reading were largely uncontroversial. The responsible State is under a duty to continue to perform the obligation breached (Art. 29) and to cease the wrongful act (Art. 30). That State is also under an obligation to make full reparation for the injury, whether material or moral, caused by its wrongful conduct (Art. 31). Consistently with Art. 3, it may not plead its internal law as an excuse for failure to comply with these obligations (Art. 32).

25 Two controversies did however arise. One concerned the concept of assurances and guarantees of non-repetition. On first reading, they were included amongst the forms of reparation but on second reading the ILC took the view that they should be considered an aspect of cessation rather than reparation. Like cessation—but unlike reparation—assurances and guarantees can only be demanded if the obligation breached is still in force. The issue confronted the ICJ in the → *LaGrand Case (Germany v United States of America)* ('*LaGrand Case*'), which concerned a failure of consular notification contrary to Art. 36 → *Vienna Convention on Consular Relations (1963)* ('VCCR'). The United States of America ('US') accepted there had been a breach, apologized, and took significant steps to ensure that the breach would not recur. Germany nevertheless sought both general and specific assurances and guarantees as to the means of future compliance with the VCCR. The court held that it had jurisdiction with respect to Germany's submission (*LaGrand Case [Judgment]* para. 48), applying the principle established in the *Chorzów Factory Case*. It held that the offered apology was insufficient in the circumstances but also held that the US had done enough to meet Germany's request for a general assurance of non-repetition (*ibid* paras 124, 128). As to the specific assurances sought by Germany, the ICJ said that in the event of a future failure of notification

an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. (*Ibid* para. 125)

26 Different views can be taken as to the ICJ's approach to assurances and guarantees, which was reserved if not unenthusiastic. No doubt judicial bodies should not issue orders in the form of platitudes, and they may be understandably reluctant to require assurances of compliance with obligations by which the respondent State is in any event bound. On the other hand assurances and guarantees are frequently sought in → *State practice*, especially in the context of treatment of individuals. For these reasons the ILC decided to retain the text provisionally adopted in 2000 on

the ground that it is drafted with flexibility and reflects a useful policy. The words 'if the circumstances so require' in Art. 30 (b) 2001 ILC Articles indicate that assurances and guarantees are not a necessary part of the legal consequences of an internationally wrongful act. They are likely to be appropriate only where there is a real risk of repetition causing injury to a requesting State or others on whose behalf it is acting. In such cases assurances and guarantees may be a valuable part of the restoration of the legal relationship affected by the breach.

- 27 A second controversy concerned the definition of 'damage' for the purposes of reparation. The draft articles adopted on first reading did not contain a comprehensive definition of 'damage'. There was a case for leaving the term undefined as it would be wrong to presume that any definition of 'injury' or 'damage' applies generally in international law without regard to context and the object and purpose of the primary obligation. However, there was a demand in the ILC for some definition, especially of such unclear terms as moral damage. One proposal would have defined injury as consisting of any damage, whether material or moral, arising in consequence of the internationally wrongful act of a State. But this was problematic, first in defining injury as consisting of damage (although in some cases damage may be the gist of the injury, in others it may not be; in still others there may be loss without any legal wrong); second, in that the notion of moral damage is differently conceived in different legal systems. In some systems it covers emotional damage or other non-material loss; in some it may extend to various forms of legal injury, eg to reputation or the affront suffered by the fact of a mere breach. In the event the ILC concluded that the different uses of the notions of injury and damage in different legal traditions required an inclusive approach to the term injury. Art. 31 (2) 2001 ILC Articles therefore reads: 'Injury *includes* any damage, whether material or moral, caused by the internationally wrongful act of a State' (emphasis added).

(b) The Forms of Reparation

- 28 Part Two Chapter II 2001 ILC Articles elaborates the forms which reparation by the responsible State may take: → *restitution*, compensation, and → *satisfaction* (Art. 34). In principle, restitution is maintained as the primary form of reparation, subject to limited exceptions. If restitution is materially impossible or would involve a burden out of all proportion to the benefit deriving from restitution there is no obligation to make restitution (Art. 35). But if restitution is unavailable or insufficient to ensure full reparation, compensation is payable for financially assessable loss (Art. 36). Where injury results which cannot be made good by either restitution or compensation, the responsible State is under an obligation to give satisfaction for the injury caused (Art. 37).
- 29 On second reading Art. 38 2001 ILC Articles dealing with interest was added. There is no specific mention of compound interest, but the commentary refers to the debate about whether and in what circumstances an award of compound interest may be justified (UN ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' Commentary to Arts 38 (8) and (9); UN ILC Special Rapporteur J Crawford, 'Third Report on State Responsibility: Add. 1' paras 195–214). In practice tribunals, especially in investment arbitration, are increasingly awarding compound interest (see also → *Investment Disputes*; → *Arbitration*).
- 30 Finally, Art. 39 2001 ILC Articles provides that where an injured State or the person on whose behalf the State is claiming contributes to the injury, this may be taken into account in the determination of reparation. This is a common sense principle which goes under various names in national legal systems—contributory fault, contributory negligence, etc. It is also implicated in some cases by the so-called duty to mitigate one's loss. Most of the precedents concern diplomatic protection, but there is no reason why the same principle should not be applied in inter-State cases also.
- 31 The rather general formulations of the ILC may be taken to reflect the → *customary international law* position, and have been applied as such by tribunals (see also → *international courts and tribunals*). But they do not go very far, for example in relation to the techniques of quantification of the value of income-producing assets in expropriation cases. In practice tribunals will often award less than the book value of assets, especially where there was never a going concern, and reliance losses may be discounted. → *Mass claims* procedures may sacrifice accuracy for speed in calculating a figure and, so to speak, closing the books. Specialized forums, eg → *human rights* bodies, may award damages more as a vindication of the rights infringed than as an economic evaluation of what was lost (→ *Human Rights, Treaty Bodies*). Moreover in many cases the respondent State could have achieved the end result lawfully but erred on some issue of procedure or process, and damages should not put the claimant in a better position than it would have experienced had the wrongful act not occurred. Another way of putting this is that the respondent State should only have to pay for the least expensive lawful course of action—but working out hypothetically what that would have been can be very difficult, eg in cases of irremediable financial collapse or the failure of a major project. Overall the award of compensation in international law is very far from being an exact science.

(c) Serious Breaches of Peremptory Norms

- 32 The controversy over international crimes has already been mentioned (see para. 13 above). The ILC eventually agreed to delete any reference to State crimes and to express the concern about the most serious breaches of international law in other ways. Within the framework of Part Two 2001 ILC Articles, certain special consequences are specified as applicable to a serious breach of obligations arising under peremptory norms. These include the obligation on the part of third States not to recognize such a breach or its consequences as lawful and to co-operate in its suppression. In addition, within the framework of invocation of responsibility it is recognized that every State is entitled to invoke responsibility for breaches of obligations to the international community as a whole, irrespective of their seriousness (Art. 48 (2) (b) 2001 ILC Articles).
- 33 This depenalization of State responsibility has generally been welcomed. The truth is that the term ‘crime’ in relation to States was never accompanied either by the due process guarantees which must attach to findings of criminal responsibility or by the penal consequences that such responsibility ought to entail. For example a proposal—in the nature of a trial balloon—by the Special Rapporteur that a serious breach may give rise to the possibility of the payment of damages reflecting the gravity of the breach proved highly controversial both within the ILC and the UN General Assembly (‘UNGA’) Sixth Committee and was rejected (‘UNGA’; → *United Nations, General Assembly*; → *United Nations, Sixth Committee*). The general view is that punitive damages have no application to States.
- 34 It is significant that the ILC eventually settled on serious breaches of peremptory norms rather than obligations to the international community as a whole as the defining term of Chapter III 2001 ILC Articles. The ICJ in articulating the concept of obligations *erga omnes* in 1970 had been concerned with invocation, not with the status of the breach as such. Since then the two terms have competed in the literature and to some extent in the case law. The 2001 ILC Articles treat peremptory norms as concerned with substance and obligations *erga omnes* as concerned with invocation. This has the merit of accurately reflecting their historical origins but it begs the question of the underlying relation between the two concepts. That there must be such a relation seems clear. On the one hand, surely all States have an interest at the level of invocation in respect of the breach of a peremptory norm. On the other hand, it would be odd if two States could deviate in their mutual relations from obligations owed in the common interest by each and invocable by all other States. Part of the difficulty has lain in the failure to distinguish obligations towards all the States Parties to a treaty—even when these happen to amount to all or virtually all States in the world—and obligations to the international community as a whole. States may assume obligations to all other States—eg in the → *law of the sea*—without these obligations being peremptory or directly enforceable as international law against non-States. Notwithstanding the prerogatives of → *sovereignty*, the international community is not to be conflated with the number of States that happen to exist at any given time—a highly variable population, historically. Once this distinction is accepted, then it seems there is no plausible example of an obligation *erga omnes* which is not also peremptory, and this suggests that the two are different aspects of a single underlying concept.
- 35 Thus Chapter III 2001 ILC Articles applies to ‘the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law’ (Art. 40 (1)). Only serious breaches, ie those characterized as involving ‘a gross or systematic failure by the responsible State to fulfil the obligation’ (Art. 40 (2)) imposed by a peremptory norm are covered. Only such breaches entail the additional consequences set out in Art. 41. The reason is that there might be minor breaches of obligations arising under peremptory norms which would not be the concern of Chapter III.
- 36 The deletion of the term ‘crime’ is not just a matter of terminology. Part One 2001 ILC Articles now proceeds on the basis that internationally wrongful acts of a State form a single category and that the criteria for such acts—in particular the criteria for attribution and the circumstances precluding wrongfulness—apply to all, without reference to any distinction between delictual and criminal responsibility. It should be stressed that national legal systems commonly adopt different secondary rules for criminal as compared with civil cases—eg in the context of defences and excuses.
- 37 Some of these issues were judicially tested in the ICJ’s → *Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)*. There, the ICJ discussed the existence of consequences for third States as a result of the breaches by → *Israel* of its obligations ‘to respect the right of the Palestinian people to self-determination and...obligations under international humanitarian law and international human rights law’ (at para. 149). Having held that, on the facts available to it, the construction of the Wall involved serious breaches of these fundamental obligations the court held that ‘[g]iven the character and the importance of the rights and obligations involved’ (ibid para. 159), other States were under an obligation not to recognize the illegal situation resulting from the construction of the wall. Furthermore they were under an obligation not to render aid and assistance in maintaining the situation thereby created, as well as to see to it that ‘while respecting the United Nations Charter and international law... any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-

determination is brought to an end' (ibid). In addition, the ICJ was of the view that the 'United Nations, and especially the UNGA and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall' (ibid para. 160; see also → *Israel, Occupied Territories*). Although the ICJ made no express reference to Arts 40 and 41 2001 ILC Articles it did use, unacknowledged, actual words drawn from Art. 41. Moreover the ICJ's reference to the 'character and importance of the rights and obligations involved' (ibid para. 159) can be read as an elliptical reference to the peremptory character of the norms in question rather than their *erga omnes* character. In an advisory opinion, there was no question of the exercise of a right of invocation.

- 38 The ICJ's approach should be contrasted with the partially dissenting opinion of Judge Kooijmans. Agreeing on the illegality of the wall and on the consequences for Israel as the responsible State, he did not agree on the consequences for third States. In particular he had

great difficulty, however, in understanding what the duty not to recognize an illegal fact involves. What are the individual addressees...supposed to do in order to comply with this obligation?...The duty not to recognize amounts, therefore, in my view to an obligation without real substance. (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [Separate Opinion of Judge Kooijmans]* paras 231–32)

- 39 In the context of sanctions, of legal penalties flowing from crimes of State, one can sympathize with the view that an obligation not to recognize a fact is illusory and insubstantial. But that was not what was at stake here. Art. 41 2001 ILC Articles, or rather the customary law obligation it seeks to embody, is not concerned with the recognition of facts but with their legitimation. States are obliged not to recognize *as lawful* a situation created by a serious breach of a peremptory norm. The recognition as lawful of a regime—whether of → *apartheid* in South Africa or of other forms of separation or alienation—is not just the recognition of a fact. It legitimates the regime and tends to its consolidation (see also → *Non-Recognition*).
- 40 Part Two Chapter III 2001 ILC Articles is thus a framework for the progressive development, within a narrow compass, of a concept which ought to be broadly acceptable. On the one hand it does not call into question established understandings of the conditions for State responsibility as contained in Part One 2001 ILC Articles. On the other hand, it recognizes that there can be egregious breaches of fundamental obligations which require some response by all States. As to such responses, the obligations imposed by Art. 41 2001 ILC Articles are not demanding, although they are by no means trivial. The most important, that of non-recognition, already reflects general international law. Genocide, → *aggression*, apartheid, and forcible denial of → *self-determination*, for example, all of which are generally accepted as prohibited by peremptory norms of general international law, constitute wrongs which shock the conscience of mankind. It is surely appropriate to reflect this in terms of the consequences attached to their breach. No doubt it is true that other breaches of international law may have serious consequences, depending on the circumstances. The notion of serious breaches of peremptory norms is without prejudice to this possibility, and to that extent the consequences referred to in Art. 41 2001 ILC Articles are non-exclusive.

3. The Invocation of Responsibility

- 41 Part Three 2001 ILC Articles deals with implementation of State responsibility; much of it was developed during the second reading.
- 42 Although it is clear that State responsibility arises under international law independently of its invocation by another State, it is still necessary to specify what other States faced with a breach of an international obligation may do to secure the performance of the obligation of cessation and reparation by the responsible State. This has sometimes been referred to as the *mise-en-oeuvre* of State responsibility. Part Three Chapter I 2001 ILC Articles deals with invocation of State responsibility by other States and with certain associated questions. Chapter II 2001 ILC Articles deals with countermeasures taken to induce the responsible State to cease the conduct in question and to provide reparation.

(a) The Injured State and Other Interested States

- 43 The concept of the injured State is central to the invocation of State responsibility. Art. 40 2001 ILC Articles adopted on first reading sought to define the injured State in an apparently unitary way. Although there was some support for the general approach underlying the text, most governments expressed serious concerns. It was open to criticism as unwieldy, prolix in its treatment of bilateral responsibility and erratic and uneven in its treatment of multilateral obligations. For example, although all States were injured by any breach of human rights, this was not the case for other

multilateral conventions in the general interest—eg environmental treaties—unless the treaty expressly so provided (see also → *Environment, Multilateral Agreements*; → *Community Interest*).

- 44 Arts 42 and 48 2001 ILC Articles deal with the concept of invocation of responsibility by making a fundamental distinction between invocation of responsibility by an injured State, and invocation of responsibility by other States. According to Art. 42 2001 ILC Articles, a State may be considered injured by a breach of an obligation in three cases. First and simplest is where the obligation is owed to it individually, eg with a bilateral treaty or an obligation under customary international law having equivalent effect. The second case is that of a multilateral obligation—up to and including an obligation to the international community as a whole—in circumstances where the breach of the obligation ‘[s]pecially affects that State’ (Art. 42 (b) (i)). This is the direct parallel and corollary of Art. 60 (2) (b) VCLT: a State entitled under Art. 60 (2) (b) VCLT to suspend a multilateral treaty for material breach must logically be recognized as injured by the breach and entitled to insist on the performance of the obligation. The third case is that of the integral obligation properly so-called, a specialized case but not uncommon in the field for example of disarmament. Again the analogy is provided by the law of treaties, Art. 60 (2) (c) VCLT: it is the case of a breach ‘of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation’.
- 45 By contrast, under Art. 48 2001 ILC Articles any State which is a member of a group of States for whose collective interest an obligation is established may invoke responsibility for breach of that obligation. Similarly any State may invoke responsibility for breach of an obligation owed to the international community as a whole. By definition obligations *erga omnes* are established for the protection of a collective interest.
- 46 In several respects Arts 42 and 48 2001 ILC Articles represent a conceptual shift from the position taken on first reading. Apart from the change in terminology from ‘international crimes’ of States (Chapter IV 1980 Draft Articles) to obligations ‘owed to the international community as a whole’ (Art. 48 (1) (b) 2001 ILC Articles), Art. 48 2001 ILC Articles rejects the legal fiction that breach of such an obligation made all other States into individually injured States. Instead it permits the invocation of the responsibility of the wrongdoing State by any one of the States identified—indeed, in the case of obligations to the international community as a whole, to all States. In effect this is public interest standing, not the expression of a subjective right. This shift reflected a wider concern at the apparent assumption that all responsibility relations are to be assimilated to classical bilateral right/duty relations, and at the failure to address the ways in which multilateral responsibility relations differ from bilateral ones. Additionally, the new formulation permits States to act in the collective public interest, a welcome development for the implementation of the international responsibility of States in areas concerning collective good or the common welfare.

(b) Forms of Reparation Available to Injured and Other States

- 47 The new formulation in Arts 42 and 48 2001 ILC Articles in respect of the invocation of State responsibility brought to light important issues as to the consequences of an internationally wrongful act. As noted already, there is a clear distinction between consequences that flow as a matter of law from the commission of an internationally wrongful act and those consequences which depend on the subsequent responses of the parties. For example, a refusal to make reparation may lead to the possibility of countermeasures; a waiver by the injured State may result in loss of the right to invoke responsibility. Both are options not requirements, yet it was sensible for the articles to deal with them.
- 48 Part Three 2001 ILC Articles seeks to address this deficiency by dealing with the modalities of and limits upon the invocation of responsibility by an injured State, including the right to elect the form of reparation. An injured State is entitled to elect between the available forms of reparation: it may prefer compensation to the possibility of restitution, as Germany did in the *Chorzów Factory Case* (at 21) or as Finland eventually chose to do in its settlement of the → *Passage through the Great Belt Case (Finland v Denmark)*. This room for choice on the part of an injured State is reflected in Art. 43 2001 ILC Articles, which provides that an injured State may specify ‘what form reparation should take’.
- 49 The possibility of non-injured States invoking responsibility of a State for an internationally wrongful act, now provided for in Art. 48 2001 ILC Articles, raises the question of the forms of reparation available to those non-injured States. No doubt where a State is individually a victim of a breach of a collective or community obligation—as, for example, Kuwait faced with Iraq’s aggression (→ *Iraq–Kuwait War [1990–91]*)—its position may be assimilated to that of the injured State in a bilateral context: Art. 42 (b) 2001 ILC Articles reflects this position. But the position is different with respect to the broader class of States which have an interest in the breach of a collective or community obligation in the absence of a direct injury: they may call for cessation and for assurances and guarantees of non-repetition; they may also insist on compliance with the obligation of reparation, in the interests of the injured State. Accordingly Art. 48 (2) 2001 ILC Articles allows this wider group of States by invoking responsibility to seek cessation of the internationally wrongful act and assurances and guarantees of non-repetition, as well as ‘performance of the obligation of reparation in accordance with the preceding articles, in the interests of the injured State or of the beneficiaries of the obligation breached’.

50 One issue that arises quite frequently—as with ‘coalitions of the willing’, which sometimes willingly overlook their individual obligations under international law—is the scope of responsibility relating to the same act or transaction but involving a plurality of States. In respect of both the invocation of responsibility by several States and the invocation of responsibility against several States, the position under international law seems straightforward. Art. 47 (1) 2001 ILC Articles provides in effect that each State is responsible for its own conduct in respect of its own international obligations—the so-called principle of independent responsibility. The position involving a plurality of injured States is also clear: each injured State is entitled to claim against any responsible State in respect of the losses flowing from the act of that State (Art. 46 2001 ILC Articles). But such claims are subject to two provisos. The first, incorporated in Art. 47 (2) (a), is that the injured State may not recover, by way of compensation, more than the damage it has suffered. The second is that where there is more than one responsible State in respect of the same injury questions of contribution may arise between them. Art. 47 (2) (b) does not address the question of contribution among several States which are responsible for the same wrongful act; it merely provides that the general principle permitting recovery is without prejudice to any right of recourse which one responsible State may have against any other responsible States. Whether a tribunal having jurisdiction over two States which are each responsible for the same wrongful conduct will have jurisdiction to apportion responsibility as between them is a separate matter.

(c) Countermeasures

51 If cessation or reparation is denied by the responsible State, a further mechanism for the implementation of responsibility is the taking of countermeasures. These are dealt with in the 2001 ILC Articles as an aspect of invocation. Part Three Chapter II was the most controversial aspect of the text on second reading. The most fundamental concern related to the very inclusion of countermeasures, either at all or in the context of the implementation of State responsibility. A second concern went to the formulation of the articles, especially those dealing with obligations not subject to countermeasures and the procedural conditions on resort to countermeasures. The third concern involved the question of so-called collective countermeasures; that is countermeasures taken by States other than the injured State.

52 One view was that countermeasures should be eliminated from the text, if not from real inter-State relations. The ILC did not accept this position. A provision on countermeasures had been present in the draft for over two decades and it had been endorsed in the jurisprudence, most notably by the ICJ in the *Gabčíkovo-Nagymaros Case (Hungary/Slovakia)* (para. 83) see also → *Gabčíkovo-Nagymaros Case [Hungary/Slovakia]*. To the extent that it was an institution or practice governed by international law it was historically part of the law of State responsibility. And the opportunity to regulate the subject through the ILC would likely not come again (see also → *Reprisals*; → *Retorsion*; → *Sanctions*).

53 From a legal point of view countermeasures are measures, otherwise unlawful, taken against another State by way of response to an unlawful act by that State. This simple definition—like all definitions, avoided in the 2001 ILC Articles—raises a host of questions. Why should an injured State be able to ignore international law obligations towards another State just because it has been wronged? Self-defence is an imperfect analogy since it is conceived as an inherent right in a situation of → *armed attack*. Outside the scope of the use of force, though, why should not the injured State be required to pursue its remedies by other means, including by retorsion, otherwise unfriendly but lawful conduct such as suspension of trade or diplomatic relations, economic boycotts, etc (see also → *Unfriendly Act*)? What is the relation between countermeasures and → *judicial settlement of international disputes*?

54 By comparison with certain other issues, the substance of the provisions relating to countermeasures adopted on first reading was approved; the review undertaken at second reading was one of synthesis and refinement rather than major change. The notion of countermeasures as temporary is emphasized by the notion of suspension of performance of obligations (Art. 49 (2) 2001 ILC Articles). It is provided that countermeasures should ‘as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question’ (Art. 49 (3)), and that they should be terminated ‘as soon as the responsible State has complied with its obligation under Part Two in relation to the internationally wrongful act’ (Art. 53). The provision on → *proportionality* was retained, although in revised terms to reflect the language of the ICJ in the *Gabčíkovo-Nagymaros Case*.

55 Art. 50 2001 ILC Articles excludes countermeasures altogether in certain cases. On second reading, it was reformulated to draw a clearer distinction between, on the one hand, fundamental substantive obligations which may not be affected by countermeasures (the prohibition on the threat or use of force, fundamental human rights obligations, humanitarian obligations prohibiting reprisals, and obligations under other peremptory norms) and, on the other hand, certain obligations concerned with the maintenance of channels of communication between the two States concerned, including machinery for the resolution of their disputes, and the basic immunities of diplomatic agents and consular officials. Art. 50 (2) (a) reflects the principle of the severability of dispute settlement provisions from related substantive obligations; Art. 50 (2) (b) addresses the special need for protection of diplomatic and consular inviolability in case of disputes, it not being the function of diplomats and consuls to be hostages abroad.

- 56 On first reading the ILC had uniquely sought to impose a requirement of dispute settlement by arbitration on any State taking countermeasures. It was the UN Conference on the Law of Treaties at Vienna in 1968 and 1969, not the ILC, which insisted on ICJ jurisdiction over States invoking peremptory norms to invalidate treaties (see Art. 66 (a) VCLT). But except in a treaty, how can resort to a customary law institution be conditioned on dispute settlement? And even in a treaty, how can resort to countermeasures be subjected to compulsory dispute settlement when the underlying dispute is not? A general obligation to settle State responsibility disputes by arbitration can hardly be distinguished from a general obligation to settle all inter-State disputes by such means, a proposal regrettably but repeatedly rejected by States. For these reasons it was generally agreed that arbitral jurisdiction should be deleted even if the 2001 ILC Articles were to be proposed for adoption in treaty form. But the relationship between countermeasures and dispute settlement, including negotiations, remained very much a live issue. The compromise eventually achieved in effect seeks to integrate the procedural conditions for taking countermeasures with existing obligations of judicial settlement without seeking to create new obligations. In particular under Art. 52 2001 ILC Articles countermeasures may not be taken, or must be suspended without undue delay if the internationally wrongful act has ceased and the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties. In effect countermeasures are the residue of remedial measures which States may resort to unilaterally when no effective third party measures exist, or where these are not honoured by the responsible State.
- 57 An equally difficult question is the entitlement of States which are not directly affected to take countermeasures, sometimes described as 'collective countermeasures' (see UN ILC Special Rapporteur J Crawford, 'Third Report on State Responsibility: Add. 4, paras 386–405; Koskenniemi 337). The draft articles adopted on first reading defined 'injured State' (Art. 40 1996 Draft Articles) broadly and allowed any injured State to take countermeasures. Thus any State whatever could take countermeasures in response to an international crime, a breach of human rights, or the breach of certain collective obligations. On second reading the ILC began by allowing countermeasures by States other than the injured State in two situations. First, countermeasures could be taken by a State 'at the request and on behalf of any State injured by the breach, to the extent that that State may itself take countermeasures under this Chapter' (Art. 48 2001 ILC Articles). This was treated as analogous to collective self-defence on behalf of a State which is the subject of an armed attack. The second situation concerned countermeasures taken in response to the serious breaches dealt with in Part Two Chapter III 2001 ILC Articles. Any State could individually take countermeasures in respect of such a serious breach.
- 58 In the ensuing debate, a matter of particular concern was the relation of this proposal to collective measures taken by or within the framework of international organizations. There was a risk of duplicating Chapter VII UN Charter at the level of the individual action of States or of a small number of States as exemplified, perhaps, in the → *Kosovo* crisis. Additionally a number of governments expressed concern at the possibility of freezing an area of law still in the process of development. A majority of the ILC agreed with the general thrust of government comments that the notion of third party countermeasures has only a doubtful basis in international law and could be destabilizing as compared with action through competent international organizations. However, there was a concern that the articles did not imply that countermeasures could only ever be taken by States directly injured in the sense of Art. 42 2001 ILC Articles: although State practice was not extensive, it did not support such a restrictive stance. While the current state of international law on measures taken in the common interest might be uncertain, it could hardly be the case that countermeasures were limited to breaches of obligations of a bilateral character. Accordingly, the ILC agreed on the need for a saving clause which would reserve the position and leave the resolution of the matter to further developments in international law and practice.

D. Diplomatic Protection and Its Alternatives

- 59 The law of diplomatic protection may be seen as an important subset of State responsibility, and some members of the ILC advocated its inclusion in the 2001 ILC Articles. The subject was, however, left for separate treatment by the ILC. Diplomatic protection, classically, is the mechanism by which a State might espouse a claim of one of its nationals in respect of an injury arising from a breach of an international obligation by another State. Reflecting this, Art. 1 Draft Articles on Diplomatic Protection, adopted on second reading by the ILC in 2006, defines diplomatic protection as:
- the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.
- 60 The traditional position is that the State, when bringing a diplomatic protection claim, is doing so on the basis of its own rights. The → *Permanent Court of International Justice (PCIJ)* in the → *Mavrommatis Concessions Cases* saw this as

an 'elementary principle' (*Case of the Mavrommatis Palestine Concessions [Greece v Great Britain] [Objection to the Jurisdiction of the Court]* 12). As it said:

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law. (Ibid)

From this flowed the basic requirement of → *nationality* of claims: a State could only protect some person or entity from breaches of international law if that person or entity was a national of that State at all relevant times.

- 61 The institution of diplomatic protection must be considered in light of cognate developments in international law. The international law of human rights, based initially on multilateral treaties involves rights of individuals at international level. But individuals can have rights under international law outside the rubric of human rights. In the *LaGrand Case* the ICJ held that a detainee's right to be informed without delay under Art. 36 (1) VCCR is an individual right, though one that could be invoked by the national State: it saw no need to categorize it as a human right (see *LaGrand Case* paras 75–78). A second development is the network of bilateral and multilateral investment protection agreements, which confer directly on individual investors rights of recourse to international arbitral tribunals, in most cases without the need to exhaust local remedies (see also → *International Centre for Settlement of Investment Disputes [ICSID]*; → *Investments, Bilateral Treaties*; → *Local Remedies, Exhaustion of*). If individual investors can invoke these rights directly and without any need to rely on the State of nationality to espouse their claim, does it remain useful to view them as substantive rights of the State at all? On one view, diplomatic protection is better seen as 'a mechanism or a procedure for invoking the international responsibility of the host State' (UN ILC Special Rapporteur M Bennouna, 'Preliminary Report on Diplomatic Protection' para. 10).
- 62 In the event, this position was rejected by the ILC in its work on diplomatic protection, essentially for two reasons. First, it was not a ground for dismissing diplomatic protection that it involved the legal fiction of adoption by States of claims that, functionally, were those of its nationals; most legal systems accept useful legal fictions. Second, it would be an exaggeration to say that international protection of human rights has developed so far as to render diplomatic protection obsolete. While the → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* provides real remedies, other regional conventions have not achieved the same success, and the majority of the world's population, in Asia, is not covered by any regional convention at all (UN ILC Special Rapporteur JR Dugard, 'First Report on Diplomatic Protection' paras 18, 22–32). The ILC proceeded on the view that international human rights law at its current stage of development does not justify discarding diplomatic protection.
- 63 On that basis the ILC went on to address the standard range of issues associated with diplomatic protection, including the content and scope of the rule of exhaustion of local remedies; nationality of claims; statelessness; and dual nationals (see also → *Stateless Persons*; → *Multiple Nationality*). It did not deal with the claims process or with grounds of admissibility often linked to diplomatic protection (see also → *Clean Hands, Principle*). Special diplomatic activities, described in the VCCR and the → *Vienna Convention on Diplomatic Relations (1961)* are also not part of the topic (see also → *Consular Functions*). As with the general study on State responsibility, the Draft Articles on Diplomatic Protection aim to codify secondary rules, leaving aside the content of the legal obligation violation of which may give rise to a case of diplomatic protection. For the text adopted on second reading see UN ILC, 'Draft Articles on Diplomatic Protection' (2006).

E. Evaluation

- 64 It is perhaps premature to assess the eventual effect of the ILC's work on State responsibility. No final decision has been taken as to the form of the draft articles: the ILC itself recommended against a convention, at least for the time being, a position endorsed by the UNGA in 2001 (with UNGA Res 56/83) and 2004 (with UNGA Res 59/35).
- 65 In the meantime States as well as non-State litigants are increasingly relying on the articles and commentaries, and international courts and tribunals are treating them as a source on questions of State responsibility. This had been the case with the ILC Articles as adopted on first reading, which were referred to by the ICJ as well as other courts and tribunals. Since 2001 the number of such references has increased. The ILC Articles and commentaries have been widely cited before and by the ICJ, arbitral panels and the Appellate Body operating under the dispute settlement mechanism of the WTO, the → *European Court of Human Rights (ECtHR)*, ICSID and other tribunals dealing with investment disputes, and other international tribunals. There is undoubtedly an ongoing process of consolidation of the international rules of State responsibility as reflected in the ILC Articles. In many cases (eg attribution, continuing wrongful acts, the components of reparation) the ILC Articles have been generally taken to

reflect customary international law. But references, direct or indirect, have also been made to other more controversial provisions, including Arts 40, 46, and 51 2001 ILC Articles.

- 66 One ground given by those favouring a convention on State responsibility concerns the need for a dispute-resolution mechanism. But the ILC Articles do not seek to articulate the so-called primary or substantive obligations of States. They form a framework for the application of these obligations, whatever they may be. This being so, a dispute over some issue of responsibility will rarely be limited to a question concerning the ILC Articles as such. It will extend to the substantive obligation breach of which is said to give rise to responsibility. As the PCIJ stressed in the *Chorzów Factory Case*, jurisdiction in respect of an internationally wrongful act extends to consequential issues of State responsibility, including the form and extent of reparation. But the question must be asked whether the converse is not also true, ie whether jurisdiction over a dispute concerning the interpretation or application of the ILC Articles—if turned into a convention—would not entail jurisdiction over the primary obligation breach of which is said to give rise to responsibility.
- 67 There is a dilemma here. Either a dispute settlement clause is limited in focus to specific issues arising under a convention on State responsibility as such, or it is formulated in broad terms. In the former case it will leave many disputes unresolved. In the latter case, the jurisdiction will extend to any claim that the respondent State has violated an international obligation and that the applicant State is entitled to invoke its responsibility therefore. Virtually any dispute concerning the rights and obligations of States can be presented as one concerning State responsibility. If there is any doubt about the matter, it can always be resolved in favour of jurisdiction by one State taking action to enforce its contested rights, eg by infringing a contested boundary(see also → *Boundaries*), exercising a contested jurisdiction or taking countermeasures in response to the conduct of the other State. No doubt the dispute will be aggravated thereby—but it will incontestably become a dispute concerning State responsibility, whatever the underlying cause may be.
- 68 Thus either a dispute settlement clause will confer a very broad jurisdiction over claims of breaches of international obligations or it will be artificially confined to secondary questions with the consequence that the court or tribunal will be disabled from completely addressing the dispute. To be useful in practice, dispute settlement in State responsibility cases needs to be broad—yet it is very doubtful whether States are ready to accept such a broad jurisdiction, unlimited as to the subject-matter of the primary obligation. It is true that many States have accepted compulsory jurisdiction, eg under the United Nations Convention on the Law of the Sea and the covered agreements of the WTO. But it is one thing to accept jurisdiction over a specified class of primary obligations in some given field and another to accept a general jurisdiction under treaties and customary international law. This leaves to one side questions of the relationship between existing jurisdictions which encompass issues of responsibility—whether for breaches of human rights or investment protection or world trade or law of the sea obligations—and the regime of dispute settlement under a general convention on State responsibility.
- 69 On balance, the better course of action remains that adopted by the UNGA in 2001 and again in 2004 in putting off any decision on the final form of the draft articles until a later date. The draft articles are performing a constructive role in articulating the secondary rules of responsibility. It may seem paradoxical that this role can only be preserved by keeping the possibility of a convention on State responsibility open while perpetually postponing a decision on the conclusion of such a convention. But given the alternatives and the danger of the UNGA Sixth Committee replicating the ILC's 40 years of work on the subject, this seems to be the best way forward. In the meantime, it may be expected that the position of the draft articles as part of the fabric of general international law will be further consolidated and refined through their application by international courts and tribunals.

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