

ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

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Historical background and development of codification

The subject of State responsibility was already regarded as a major area of interest in the development of international law in the first half of the twentieth century. It had been selected for codification under the League of Nations, and was one of the principal subjects of the unsuccessful conference in The Hague in 1930. In 1948, the United Nations General Assembly established the International Law Commission (“ILC”), and State responsibility was selected amongst the first 14 topics to be dealt with by the new body.

The first Special Rapporteur on the matter, F.V. García Amador (Cuba), began his work in 1956, submitting six reports between that year and 1961, focusing the work of the ILC on State responsibility for injuries to aliens and their property, while also dealing with general aspects of responsibility. Due to other commitments, the ILC did not discuss his reports in any detail.

By 1962, the idea that the ILC should shift its focus towards the “definition of the general rules governing the international responsibility of the State” (R. Ago) gained support. Professor Ago (Italy), as the second Special Rapporteur on the subject, submitted eight reports as well as a substantial addendum between the years 1969 and 1980. During that time, the ILC adopted 35 articles, which constitute the foundation of the articles on the origin and fundamental features of State responsibility (the current Part One of the Articles on Responsibility of State for Internationally Wrongful Acts, hereinafter “Articles”).

Between 1980 and 1986, the third Special Rapporteur, W. Riphagen (Netherlands), presented seven reports, his main contribution to the development of the debate being the provisional adoption by the ILC of an elaborate definition of “injured State”.

Mr. Riphagen was succeeded by G. Arangio-Ruiz (Italy), at the end of whose work at the Commission (from 1988 to 1996), following the submission of eight reports, the ILC adopted a first comprehensive text of the draft Articles, with commentaries, to which Mr. Arangio-Ruiz’s major contribution consisted in the sections on reparation, countermeasures, on the consequences of “international crimes” and on dispute settlement.

In 1997, the Commission appointed J. Crawford (Australia) as Special Rapporteur and from 1998 to 2001 the ILC undertook a second reading of the draft Articles.

Between 1998 and 2000, it reviewed the entire text and adopted a new draft of the Articles that was submitted to the comments of Governments, following the examination of which, during its fifty-third session, in 2001, the final version,

consisting of 59 draft Articles, was adopted. A commentary to them was also completed.

By resolution 56/83 of 12 December 2001, the General Assembly took note of the Articles, the text of which was annexed to the resolution, and commended them to the attention of Governments, without prejudice to their future adoption as a treaty text or other appropriate action.

The Articles were again commended by the General Assembly to the attention of Governments in resolution 59/35 of 2 December 2004, which also requested the Secretary-General to prepare an initial compilation of decisions of international courts, tribunals and other bodies referring to the Articles.

General Assembly resolution 62/61 of 6 December 2007 noted with appreciation such compilation, further commending the Articles to the attention of Governments and resolving to further examine the question of a convention on the responsibility of States for internationally wrongful acts, or other appropriate action on the basis of the Articles.

A similar position was taken by General Assembly resolution 65/19 of 6 December 2010. Although some delegations have pressed for a diplomatic conference to consider the Articles, others have preferred to maintain their status as an ILC text approved *ad referendum* by the General Assembly. In fact they have been very widely approved and applied in practice, including by the International Court of Justice.

Structure of the Articles

The 59 Articles on the Responsibility of States for Internationally Wrongful Acts are divided into four Parts.

Part One (The Internationally Wrongful Act of the State, articles 1-27) is further divided into five Chapters (General Principles, articles 1-3; Attribution of Conduct to a State, articles 4-11; Breach of an International Obligation, articles 12-15; Responsibility of a State in Connection with the Act of another State, articles 16-19; Circumstances Precluding Wrongfulness, articles 20-27).

Part Two (Content of the International Responsibility of a State, articles 28-41) is divided into three Chapters (General Principles, articles 28-33; Reparation for Injuries, articles 34-39; Serious Breaches of Obligations under Peremptory Norms of General International Law, articles 40-41).

Part Three (The Implementation of the International Responsibility of a State, articles 42-54) consists of two Chapters (Invocation of the Responsibility of a State, articles 42-48; Countermeasures, articles 49-54).

Part Four (articles 55-59) contains the final five General Provisions of the text.

Basic principles

i. State responsibility as “secondary rules”

The initial reports on State Responsibility, drafted between 1956 and 1961 under the direction of García Amador, focused, among other things, on substantive rules of

the international law of diplomatic protection, as well as other substantive obligations. Such an approach proved unsuccessful, not least because it was over-ambitious, and the work of the ILC soon shifted towards the more limited but more realistic task of devising a general framework of rules of State responsibility, rather than drafting a code of substantive provisions containing old or new obligations for States.

Already with the work of Special Rapporteur Ago, and more markedly with regard to the 1996 draft Articles as well as their final version, the rules on State responsibility may be described as “secondary rules”. Whereas the law relating to the content and the duration of substantive State obligations is determined by primary rules contained in a multitude of different instruments and in customary law, the Articles provide an overarching, general framework which sets the consequences of a breach of an applicable primary obligation. Otherwise the Articles would constantly risk trying to do too much, telling States what kinds of obligations they can have.

ii. The foundations of State responsibility

What is now Part One of the Articles (The Internationally Wrongful Act of the State) was the first to receive a coherent and durable structure already under Special Rapporteur Ago. The 35 draft Articles adopted between 1969 and 1980 proved particularly influential, *inter alia*, with regard to rules of attribution and general justifications and excuses for internationally wrongful acts. They have been frequently referred to by scholars and cited by courts.

The structure then devised for the five chapters of Part One of such draft has remained unaltered.

Part One establishes the fundamental postulates defining the basic features of State responsibility for internationally wrongful acts.

An initial, fundamental principle concerning State responsibility is expressed by article 1, which establishes: “[e]very international wrongful act of a State entails the international responsibility of that State”. It is of particular significance that such a provision is not limited, as had been proposed, to the responsibility of States towards other States, which would have significantly curtailed the scope of the obligations covered by the Articles and could have stifled the development of international law. Furthermore, article 1 makes no distinction between treaty and non-treaty obligations: no categorical differentiation is therefore drawn between responsibility *ex contractu* and *ex delicto*, nor is any distinction made, at this level of generality, between bilateral and multilateral obligations (see also article 12).

Article 2 sets out the required elements for the existence of an internationally wrongful act: (a) conduct attributable to the State, which (b) is inconsistent with its international obligations. One notable feature of this provision consists in the absence of any requirement concerning fault or a wrongful intent on the part of the State in order to ascertain the existence of an internationally wrongful act. This does not, of course, imply that the element of fault has no place in the law of State responsibility. Rather, it reflects the consideration that different primary rules on international responsibility may impose different standards of fault, ranging from “due diligence” to strict liability.

The position expressed by the Articles indicates that fault is not necessarily required in every case for international responsibility to arise. It may be required, of course, in some or even many cases, but this determination is left to primary rules on

State obligations, with the Articles taking a neutral position in this regard, neither requiring nor excluding these elements in any given case.

As for the attribution of a particular conduct to a State, the provisions of Chapter II of Part One specify the scope of this concept, both from a subjective and a functional point of view (see the notion of “organ” of a State under article 4; of a person or group directed or controlled by the State under article 8; of an organ placed at the disposal of the State by another State under article 6; of a person or entity exercising elements of governmental authority under article 5; of persons or groups acting in the absence or default of official authorities under article 9; of acts of insurrectional or other movements, under article 10). Chapter II closes with a provision on responsibility for conduct acknowledged and accepted by a State as its own (article 11), on the analogy of ratification in the domestic law of agency.

Certain significant aspects of the temporal dimension of the breach of an international obligation are dealt with in Chapter III of Part One (the *tempus regit actum* principle (article 13)); the extension in time of the breach (article 14); and breach consisting of a composite act (article 15). But no further analytical distinctions are attempted amongst different kinds of breach, or for that matter different classes of obligation. It should be noted that a particularly refined and elaborate categorization of internationally wrongful acts had been developed by Special Rapporteur Ago. Apart from the distinction between crimes and delicts (later abandoned), Professor Ago’s draft articles concerning these matters drew distinctions amongst, *inter alia*, obligations of conduct, of result and of prevention, as well as amongst continuing, composite and complex wrongful acts. The final text thus represents a considerable simplification, leaving much to the interpretation of the primary rule.

The attribution of responsibility to a State is also dealt with in relation to possible connections between a State and internationally wrongful acts of another State, in particular in cases of aid or assistance (article 16), direction and control (article 17) or coercion (article 18); these are included in Chapter IV of Part 1. The rationale underlying these provisions is that the State not directly committing the wrong is nonetheless held responsible if it has knowledge of the circumstances of the act and if the act would be, if committed by such State (or by the coerced State, in the absence of coercion), an internationally wrongful act.

With regard to the fundamental notion of wrongfulness, Chapter V of Part One enumerates “circumstances precluding wrongfulness” – what, in a forensic context, would be called defences. These are: consent (article 20), self-defence (article 21), legitimate countermeasures (article 22; further elaborated upon in Part Three, Chapter II); *force majeure* (article 23); distress (article 24) and necessity (article 25).

The consequences of State responsibility

Part Two of the Articles deals mainly with two issues: on the one hand, it specifies the most significant consequences of State responsibility for an internationally wrongful act, namely the obligations of cessation, non-repetition and reparation; on the other hand, it is concerned with a particular category of wrongful acts: those acts that, replacing the problematic category of “international crimes”, are now termed “serious breaches of obligations under peremptory norms of general international law”.

Chapter I of Part Two sets out the consequences of an internationally wrongful act: such an act does not affect the continued duty by the responsible State to

perform the obligation thus breached (article 29); if the breach is continuing, the responsible State is under an obligation to cease its conduct (article 30, paragraph a) and, if circumstances so require, to offer appropriate assurances and guarantees of non-repetition (article 30, paragraph b). In addition, the internationally wrongful act entails for the responsible State the duty to make full reparation for the injury caused (article 31).

As for the continued duty of performance, its status amongst the consequences of an internationally wrongful act is uncontroversial, as is the principle that the domestic law of the responsible State is irrelevant as an excuse for failure to comply with the obligations flowing from its international responsibility for a wrongful act (article 32).

With regard to the duty of cessation, it should be noted that, already under Special Rapporteur Arangio-Ruiz, the ILC had come to the conclusion that such a remedy (together with non-repetition) had equal status with reparation. Treating the two together was thought conducive to a more balanced regime, more attentive to the real concerns of governments in most disputes about responsibility, where reparation is usually not the only issue, and may not be an issue at all.

As for assurances and guarantees of non-repetition, their status as consequences of breaches of international obligations was more debated. In particular, it was a matter of discussion whether they should be considered more akin to cessation or to reparation and, more radically, whether they should be regarded as an autonomous consequence of international responsibility at all. With regard to the latter question, the decisive element was the consistent support of Governments in favour of their inclusion. It should also be noted that the specification that assurances and guarantees of non-repetition are appropriate only “if circumstances so require” (article 30, paragraph b) makes them a flexible instrument; they are not a necessary consequence of an internationally wrongful act. They are likely to be considered appropriate only where there is a real risk of repetition causing injury to a requesting State or others on whose behalf it is acting.

The nature and forms of reparation

According to the general rule stated by article 31, the State responsible for an internationally wrongful act is under the obligation to make full reparation for the injury caused by it. “Injury” is defined as any damage, whether material or moral, caused by the act, although it should be noted that the Articles do not provide for any sort of “punitive” damages to be awarded to the injured State, consistently with clear State practice in that regard. The text of article 31 addresses a series of concerns: (a) it was thought necessary to draft the provision in such a way as to preserve the conceptual separateness of the notions of “injury” and “damage”; (b) it was considered useful to retain the notion of “moral damage”, notwithstanding the interpretative difficulties that may be associated with it, in order to include under a single expression all kinds of non-material loss which may be compensable; c) the vexed question of causation was resolved through the adoption of the expression “caused by”, in order to allow for different tests of remoteness and causality which may be appropriate for different obligations or in different contexts, having regard to the interest sought to be protected by the relevant primary rule.

Articles 35 to 37 elaborate upon the forms that reparation may take: restitution, compensation and satisfaction. Although, as will be seen, the injured State is entitled to indicate the kind of reparation it prefers, restitution is considered the

primary form of reparation, except in the event that it is materially impossible or where it would involve a burden out of all proportion to the benefit derived from selecting it instead of compensation. If restitution is unavailable or insufficient to ensure full reparation, compensation is payable for “financially assessable” loss. 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.

Serious breaches of obligations under peremptory norms of general international law

Another major debate within the ILC (further animated by a dictum of 1970 by the International Court of Justice in the *Barcelona Traction Case*) concerned the appropriateness of providing for a separate category of wrongful acts committed by States that would be considered so serious as to be defined “international crimes”, offending the international community as a whole and not just the injured State.

The proposal, although highly contentious, gathered sufficient support to lead to the insertion of the notion of international crimes in article 19 of the 1996 draft. This defined as an international crime “an internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole”. The 1996 draft addressed two relevant developments in the law of State responsibility: on the one hand, certain obligations are classified as obligations towards the international community and not only towards individual States; on the other, certain particularly serious breaches of such obligations should attract sanctions of particular severity. Notwithstanding the general readiness on the part of the majority of States to accept those general principles, the idea of holding a State responsible for a “crime” remained – and remains – highly divisive. In addition to the opposition by a significant number of States, the provision on international crimes faced problems stemming from the compatibility of the concept of crime with the legal framework of inter-State relations, as well as from the need to provide, together with the criminalization of State action, basic guarantees of due process which are correlatives of criminal responsibility, but were absent from the 1996 draft.

These considerations led to the eventual demise of the notion of international crimes, but the need for a stronger protection of certain significant legal interests of the international community as a whole found expression in the Articles through the introduction of the category of “serious breaches of obligations under peremptory norms of general international law” (Part Two, Chapter III, articles 40-41).

The notion of peremptory norms is based on an illustrious codified antecedent in the two Vienna Conventions on the Law of Treaties and is now widely accepted. The qualification of a norm as peremptory is left to evolving State practice and to the decisions of competent judicial bodies. Article 40 deals with “gross or systematic failure[s] by the responsible State to fulfil the obligation[s]” imposed by a peremptory norm. In the presence of such serious breaches the violator is subject, in addition to the consequences arising from the breach of any international obligation, to the supplementary consequences set out in article 41.

Articles 40 to 41 acknowledge that certain egregious breaches of fundamental obligations allow for a response by all States. This, neither draconian nor trivial, entails the duty not to recognize as lawful such breaches, the prohibition to render aid

or assistance in maintaining the illegitimate situation created by the wrong as well as the duty to cooperate to bring, through lawful means, such situation to an end.

Genocide, aggression, apartheid and forcible denial of self-determination, for example, all of which are generally regarded as prohibited by peremptory norms of general international law, constitute wrongs which, as the International Court of Justice said, “shock the conscience of mankind” (*Reservations to the Convention on the Prevention and Punishment of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15). It seems appropriate to allow this reasoning to be reflected in the consequences attached to their breach, while avoiding, in the absence of any international agreement, the problematic expression “crimes”.

The invocation of responsibility

Parts One and Two clarify the fundamental features and consequences of internationally wrongful acts of States. Other questions arise about which States are entitled to invoke the responsibility arising from such acts and what are the modalities through which this can be done. Such questions are dealt with in Part Three, which was developed during the second reading.

The question of who is entitled to invoke State responsibility had to be resolved by taking into account the different obligations of States in the sphere of international relations. Such duties may arise in the context of bilateral or multilateral relations, as well as from obligations intended to benefit the international community in its entirety, without distinction. In other words, the right to invoke responsibility is not necessarily co-extensive with the circumstance of being the victim of the breach of an international obligation: the injured State may not be the only one entitled to invoke responsibility for an internationally wrongful act, although injured States should retain priority in terms of any response.

For this reason, on the one hand, article 42 defines in a rather narrow way the concept of injured State (based mostly on article 60, paragraph 2 of the Vienna Convention on the Law of Treaties), while article 48 is concerned with the invocation of responsibility in the collective interest, *i.e.* also by non-injured States. Article 42 provides that the breach of an obligation entitles a State to invoke the responsibility of another State when the obligation is owed to that State individually or, in the context of multilateral obligations, when such State is specially affected by the breach, or “is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.” It should be noted that integral obligations are only those which operate in a strict all-or-nothing fashion, such that each State’s performance of the obligation is in effect conditioned upon performance by each other party (e.g., certain disarmament obligations). Human rights obligations are not, in this sense, integral, but may be better described as incremental obligations, and the failure to perform by one Party does not relieve other Parties from the duty to comply with them.

States entitled to invoke responsibility who are not individually injured by a breach are those described in article 48, which lists: (i) States belonging to a group holding a collective interest for the protection of which the obligation was established; (ii) every State seeking to invoke responsibility for a breach of an obligation owed to the international community as a whole. As with the definition of international responsibility in article 1, also article 48 avoids restricting the scope of obligations owed *erga omnes* by limiting their beneficiaries to States alone. In this sense, the concept of international community relevant for article 48 implies that this community

does not consist exclusively of States and includes other entities, for example the United Nations, the European Union, the International Committee of the Red Cross.

In general, an injured State has the right to elect the form of reparation that it considers more appropriate. Thus, it may prefer compensation to the possibility of restitution, or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim (article 43, paragraph 2). The choice of a form of reparation, together with the indication of the conduct that the responsible State should take in order to cease a continuing wrongful act, are possible aspects of the notice that the injured State should provide to the responsible State as a basis for enforcing its rights (article 43).

Article 44 provides that the possibility to invoke the responsibility of a State is further conditioned on compliance with any applicable rules concerning the nationality of claims and the exhaustion of local remedies. These requirements are dealt with in further detail in the ILC's Articles on Diplomatic Protection adopted in 2006.

The right to invoke responsibility is lost in two cases set out by article 45: the first is where such right has been waived by the injured State, either with regard to the breach itself or some or all of its consequences; the waiver has to be clear and unequivocal. The second, somewhat more complex, is where the injured State "is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim". There is no clear-cut time limit for the purposes of invoking responsibility: the decisive factor is whether the respondent could have reasonably expected that the claim would no longer be pursued, thus making the delay unreasonable.

The Articles also deal with the question of claims related to the same act or transaction but involving a plurality of States. In relation to the invocation of responsibility both by and against several States, the position of international law is straightforward: each State is responsible for its own conduct in respect of its own international obligations, and each injured State is entitled to claim against any responsible State in respect of the losses flowing from the act of that State. This rule is subject to two caveats, set out by article 47, paragraph 2: the injured State may not recover, by way of compensation, more than the damage it has suffered (the rule against double recovery), and questions of contribution may arise between States, when more than one is responsible in respect of the same injury.

Countermeasures

Among the most debated issues related to the responsibility of States for internationally wrongful acts, the possibility to have recourse to countermeasures as a reaction by, or on behalf of, the injured State has been subject to various substantial and procedural limitations set out by Chapter II of Part Three of the Articles.

Countermeasures are allowed as a means to ensure cessation and reparation by the responsible State. Even if their effect is afflictive, therefore, they cannot be regarded as a punishment in itself or as retribution (article 49). From this substantive limitation derives the essentially temporary character of countermeasures, which are limited to the temporary non-performance of certain international obligations towards the responsible State (article 49, paragraph 2), and they should cease "as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act" (article 53). Given their temporary character, they have

to be devised in such a way as to permit the resumption of performance (article 49, paragraph 3) when and if compliance has been obtained.

The fundamental quantitative and qualitative limitation upon countermeasures is the requirement of proportionality: article 51 provides that they “must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question”. Further substantial limits to countermeasures are established by article 50, according to which certain fundamental substantive obligations may not be affected by countermeasures (the prohibition on the threat or use of force, fundamental human rights obligations, humanitarian obligations prohibiting reprisals and, generally, obligations under peremptory norms). Also unaffected by countermeasures are certain obligations concerned with maintaining channels of communication between the States concerned, in particular those related to dispute settlement procedures applicable between the interested parties and to the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 52, paragraph 3 (b), provides for the suspension of countermeasures where the States concerned are before a competent court or tribunal with the power to make binding decisions. But the prohibition of countermeasures while negotiations are being pursued in good faith was deleted from the final version of the Articles as too uncertain and indeterminate.

The taking of countermeasures is also subject to a series of procedural conditions (article 52), among which the obligation to call upon the responsible State to fulfil its obligations of cessation and reparation. The responsible State has also to be notified of any decision to take countermeasures, and given a chance to negotiate. One of the most controversial procedural obstacles to the adoption of countermeasures, namely the unilateral right of the responsible State to submit a dispute over countermeasures to arbitration, has been deleted from the final draft. Such generalized recourse to a compulsory judicial settlement of a wide range of disputes did not receive the necessary support of governments. This rendered the proposed separate category of “provisional countermeasures” somewhat redundant, but article 52, paragraph 2, still allows the injured State to take “such urgent countermeasures as are necessary to preserve its rights”.

Lastly, the drafting of the Articles occasioned a debate on the opportunity to allow countermeasures to be taken by States other than the injured State. Such measures have been referred to as “collective countermeasures”, to indicate both cases where some or many States acted in concert and cases where the reacting State asserts a right to enact countermeasures in the public interest as a response to a breach of a multilateral obligation, or where the measures are coordinated by a number of involved States. While the current state of international law on collective countermeasures is limited and embryonic, States do not appear to have renounced all possibility of individual action in case of inaction of international organizations faced with humanitarian or other crises arising from serious breaches of collective obligations. Given this uncertain state of affairs, the final position adopted in the drafting of the Articles was to provide for a saving clause which reserves the position and leaves the final resolution of the matter to the further development of international law. Article 54 provides that the Chapter on countermeasures does not prejudice the right of any non-injured State entitled to invoke the responsibility of another State, to take “lawful measures against [the responsible State] to ensure cessation of the breach and reparation in the interests of the injured State or of the beneficiaries of the obligation breached”.

Part IV

The Articles end with a brief series of final provisions that clarify the boundaries and the scope of the Articles in relation to other provisions of international law. Articles 57 and 58 clarify that the Articles do not affect the law applicable to the responsibility of international organizations (as well as of any State for the conduct of an international organization) or the responsibility under international law of any person acting on behalf of a State. The ILC in 2011 adopted a set of draft Articles on the Responsibility of International Organizations dealing with these issues.

Articles 55 and 56 provide that whenever the object of the Articles is regulated by a *lex specialis*, the latter applies, as does any applicable rule of international law on the matter in questions not regulated by the Articles. Finally, article 59 restates the primacy of the Charter of the United Nations in the matter of responsibility.

Further reading

United Nations Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts (ST/LEG/SER B/25, U.N. Sales. No. E.12.V.12);

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