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A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility

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Abstract

The multilateral dimension of a number of international obligations raised the need for a review of the classical law of state responsibility, originally designed in the context of bilateral inter-state relationships. In this lengthy process, the International Law Commission sought to enhance the function of the responsibility of states as an instrument for restoring international legality. This tendency was reinforced by the introduction in its Draft Article 19 (1976–1996) of two categories of international wrongful acts: ‘delicts’ and ‘crimes’ of states. The final solution adopted by the ILC had to take into account the negative reactions of several states to this distinction. It thus maintains the distinction, while abandoning the ambiguous term of ‘crime of state’. However, it consequently fails to differentiate the legal regime of obligations of the state responsible for the violation of ‘obligations under peremptory norms of general international law’; the ILC substantially clarifies the notion of ‘injured state’. Regrettably, criticism by some states of the draft as adopted in August 2000 resulted in the consolidation, or even introduction, of some incongruities in the final Draft Articles. Nevertheless, the final text constitutes a major contribution to the consolidation of the international law of state responsibility as a tool for the reparation of international wrongs and the restoration of international legality. Its weaknesses are not those of its authors but primarily of states and their political incapacity to develop the international institutions required by the normative design of new concepts such as ‘peremptory norms of international law’.

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1 ‘We’! ‘We, the Peoples of the United Nations ...’

With this plural reference, the UN Charter aimed to inaugurate a new era founded upon the affirmation of a community of fate among the peoples of the planet. Equally, through these words, the Charter committed the peoples to respect for a duty of cooperation to promote and defend a good now seen as indivisible: international peace, the object of collective security. This fundamental inaugural affirmation of the community dimension of the international order was, to be sure, not without precedent. There were historical antecedents, though never on a universal scale; and, 25 years earlier, the creation of the League of Nations had been a clumsy forerunner. After two world wars, international society had to become also a world society; and common interests had to transcend the interests of each state. The multilateral age definitively dawned in 1945, and whether one likes it or not the spirit of the UN Charter had come to clash head on with that of the Treaties of Westphalia.

Reiteration of this community dimension was to acquire new impetus 15 to 20 years later with the arrival on the international scene of the new states emerging from decolonization. However, consolidation of the enlarged multilateral dimension into the universal was steadily to complicate the facts of the legal technique that legal positivism had forged, specifically since the beginning of the century. According to its approach, which the bulk of scholars had come to follow, relations between states are established exclusively on the will of each; the bilateral dimension is accordingly predominant. All the old considerations deriving from natural law, founded in particular on the acknowledgment of a *communitas gentium*, and still to be found in Grotius or Pufendorf, are here not so much always denied as often evaded, or relegated to a distant background.

This is true for the law of treaties. In the time of the ‘Lotus society’,¹ a treaty was first and foremost a contract between two unfettered subjects according to their own will; the positive law of the inter-war period only regretfully allowed a few adjustments to synallagmatic techniques, where a treaty concerned a plurality of states. The provisions for reservations or the conditions for amending treaties still testify to this.

It was also true in the law of responsibility. As Paul Reuter was still saying in his general course at the Hague Academy in 1961, this law draws its unity from the fact that, by establishing a simple, direct relation between two equally sovereign subjects, the author of the wrongful act and the victim, the law of responsibility is reduced to one essential function, namely, reparation.²

The codification of the law of treaties was the first codification project to grapple with the general multilateral dimension of an obligation as a barrier to the specific bilateral freedom of contract. It was here that the concept of the ‘peremptory norm of general international law’, defined as a norm ‘accepted and recognized by the

¹ I.e. the period, historically short to be sure, but fertile for scholarship, during which the vision of a law of juxtaposed sovereignties held sway, particularly in the case law of the PCIJ (i.e. between 1922 and 1939), over all other considerations.

² Even if this term legally also covers restoration of the legal position prior to the occurrence of the wrongful act: see Reuter, ‘Principes de droit international public’, 103 *RCADI* (1961-II) 425.

international community of states as a whole ... from which no derogation is permitted' was born.³ This codification was to have its happy end in the euphoria of the 1969 Vienna Conference. By contrast, in the area of responsibility, the outcome of almost 40 years of effort by the same ILC was not destined to have the same good fortune. At its 56th session, consideration of the text finally completed by the ILC in summer 2001 was only the 162nd agenda item for the UN General Assembly. It was the object of Resolution 56/83, adopted almost at the last moment on 12 December 2001. The resolution contents itself with 'taking note' of the 'Articles on Responsibility of states for Internationally Wrongful Acts' which it adds in an annex,⁴ postponing possible reconsideration until later. There was no solemn closure meeting, nor high-flown speeches to hail the completion of such a vast project. This caution and discretion contrasts sharply with the outcome of the same body's work, enshrined 32 years earlier in the Vienna Convention. On the one hand was the feeling of having accomplished a decisive step in the affirmation of a normative community; on the other, there was an impression of a set of over-complex questions that reflected back onto the 'international community as a whole' an image of itself it did not truly feel able to adopt.

Yet there is one red thread running from the 1969 text on treaties to the 2001 text on responsibility: *jus cogens*. As Marina Spinedi recalls,⁵ Roberto Ago, the initiator of the first part of the draft regarding the act giving rise to responsibility, stated in 1976 that: 'It would be hard to believe that the evolution of the legal consciousness of States with regard to the idea of the inadmissibility of any derogation from certain rules has not been accompanied by a parallel evolution in the domain of State responsibility'.⁶ It is thus appropriate, before we continue, to consider the appearance of the multilateral dimension in the effort at codifying the law of responsibility.

In 1962, after having directly contributed to distinguishing the law of responsibility

³ Article 53 of the Vienna Convention on the Law of Treaties, 1969. It is particularly interesting, following Georg Nolte and Marina Spinedi, to trace back the genealogy of the appearance of *jus cogens* in the ILC's work on the law of treaties. The assertion of the existence of obligations from which no derogation by treaty is permitted is indeed of doctrinal origin; it emerged on the initiative of the first Special Rapporteurs, Sir Hersch Lauterpacht and then Sir Gerald Fitzmaurice, well before the appearance of the demands of the new states emerging from decolonization. Article 15 proposed by Lauterpacht in 1953 in his second report provides that a treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared to be so by the International Court of Justice. We find an identical inspiration in 1958 in the draft that Fitzmaurice submitted to the ILC. After 1945, these authors first drew their inspiration from the quasi-constitutional principle of the ban on recourse to force around which the United Nations Charter was constructed. They were also influenced by other rules, such as the rule obliging states to prevent and deter the crime of genocide, which the International Court of Justice had just stated was part of general international law because the treaty embodying it was declared to be only declaratory. See ICJ Reports (1951) 23.

⁴ The resolution simply brings the provisions 'to the attention of Governments without prejudice to the question of their future adoption or other appropriate action'. It goes on to provide for the entry on the agenda for the 59th session of an item headed 'State responsibility for internationally wrongful acts'.

⁵ See Spinedi, 'From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility', 13 *EJIL* (2002) 1099.

⁶ Ago, Fifth Report, *ILC Yearbook* (1976) vol. II, Part One, at 33–34, para. 57.

as a set of ‘secondary norms’ — contrary to the rut it had initially been shoved into by considering the consequences that may be attributed to damage caused to foreigners alone — Roberto Ago relaunched the ILC’s work on the matter. He embarked on codifying the theory of the originating act and its technical components. Soviet scholarship added to the concepts he had himself stated in his 1939 course at the Hague Academy of International Law on the international delict, by identifying a penal component in the international responsibility of states.

At least, this is the case where the latter state has breached not just the intersubjective obligation binding it to another state, but obligations owed *erga omnes*, that is, towards all; the latter are in particular — following the International Court of Justice in the celebrated paragraph 34 of its judgment in the *Barcelona Traction* case — those obligations that ‘derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination’.⁷ This thus affirms, alongside the obligations of the guilty state, the rights of the states affected by this breach of the norms of international *ordre public*.

This broadening of responsibility is reflected in the conception the ILC adopts of it. For the ILC, as Marina Spinedi has taken care to recall, the term denotes:

every kind of new relations which may arise, in international law, from the internationally wrongful act of a State, whether such relations . . . are centred on the duty of the guilty State to restore the injured State in its rights and repair the damage caused, or whether they also give the injured State itself or other subjects of international law the right to impose on the offending State a sanction admitted by international law.⁸

We note in the definition itself an echo of the definition adopted in Article 1 of the various versions of the draft, from which any reference to damage as a factor for identifying who is entitled to sue for responsibility is banished.⁹ Thus from the outset the dialectic of the relations between the inter-individual or bilateral dimension of responsibility and the affirmation of its potentially multilateral dimension is posited.

Did the Special Rapporteur, Roberto Ago, an illustrious representative of Italian scholarship, ritually murder the father of the modern law of responsibility, Dionisio Anzilotti? The answer is both yes and no, as Georg Nolte’s introductory report suggests. Yes, in as much as one cannot doubt that this is a fairly radical change by comparison with the concept that had become classical in the law of responsibility. From his celebrated 1906 article in the *Revue générale de droit international public* onward, Anzilotti had devoted every effort to ridding the originating act of any connotation of fault; now, on the contrary, the return of the penalist concept of the ‘international crime of the state’ seems necessarily to reintroduce the search for subjective intentions, at the very point of constituting the wrongful act, unless the

⁷ ICJ Reports (1970), at 3 (32), para. 34.

⁸ *ILC Yearbook* (1973) vol. II, at 175. See Spinedi, *supra* note 5, text at fn. 59.

⁹ Article 1 of the final text provides: ‘Every internationally wrongful act of a State entails the international responsibility of that State.’

reality of the latter is established by its 'gravity', a notion that has repeatedly and emphatically been shown during this colloquium to be ambiguous. There was a contradiction, too, with Anzilotti's theses, to the extent that he remained faithful to a bilateral conception of responsibility, which was fully in agreement with the voluntarism of the future president of the Court, who was to deliver its judgment in the *Lotus* case. It was, equally, in agreement with the strict conception he had of the subjective rights owned by each sovereign state.

Yet, on a closer look, there is another aspect of Anzilotti's thought that instead foreshadows Ago's conceptions.¹⁰ To the extent that Anzilotti gives an essentially legal definition of responsibility and of damage, understood as a pure infringement of a subjective right, he declares the interest of each state in having international law, as a normative system or body of rules, respected by all of its subjects. Responsibility is here perceived in reference to the principle of legality. It implicitly designates the collective interest in respect for the 'rule of law'.¹¹

It remains the case that, following Anzilotti, but also Kelsen, Verdross, Karl Strupp and Hersch Lauterpacht, albeit starting from different viewpoints as to the nature of the sanction, Ago first codified responsibility in order better to assure legality. In a legal order devoid of an integrated control and sanction apparatus against infringements of the obligations bearing on its subjects, there was a great temptation to dwell on the retributive dimension of responsibility, while linking its operation with the embryonic organic integration already set up in the context of the maintenance of peace.¹²

As a man of his times, Ago accordingly attempted to take note of the substantial duality of international obligations enshrined in the Vienna Convention and in the Court's *obiter dictum* in the *Barcelona Traction* case. Alongside an ordinary legality with a bilateral dimension, a higher legality was affirmed, which was not merely multilateral in nature but also universal. This was specifically noted by the ILC at the level of contractual relations and treaty law, and was reflected in the feature of non-derogability. It remained to determine the consequences at the level of responsibility.

Two ideas thus dominate the whole of the codification work: first, that of responsibility as the guardian of legality; secondly, that of the duality of that very legality. It is on the basis of this twofold view that the whole work of the ILC has to be assessed, including the final outcome it has reached. As Bruno Simma in particular

¹⁰ See Dupuy, 'Le fait générateur de la responsabilité internationale des Etats', 188 *RCADI* (1984-V) 9, at 29–33; and Dupuy, 'Dionisio Anzilotti and the Law of International Responsibility of States', 3 *EJIL* (1992) 139.

¹¹ Though the concept of 'international community' (then designated the 'society of States') was very much present in Anzilotti's course on international law, translated into French in 1929 by Gilbert Gidel. At that time the concept had not yet been legally instituted. The concept was recognized in, for example, Article 53 of the Vienna Convention on the Law of Treaties of 1969, where it was given the normative role of identifying the norms all members have an equal interest in safeguarding.

¹² The retribution in this case is a 'negative retribution' of the guilty state, to use the phraseology of Jean Combacau.

was able to note in the debates following the presentation of the various papers at this colloquium, even though many other questions were tackled,¹³ it was the introduction of the multilateral aspect into the codification work which constituted the main stumbling block of the successive drafts.¹⁴ It is, however, from the fifth report onwards that the difficulty truly emerges that is involved in grafting onto the classical bilateral law of reparations a sanction for the infringement of the collective interests of the members of the international community. Ago's successors, Riphagen, Arangio-Ruiz and Crawford, were successively to be confronted with the same difficulties.

Two questions in particular fed the debates until completion of the draft adopted in 2001: first, in relation to responsibility, to what extent were obligations bearing on the perpetrator state to be differentiated according to the type of obligation breached? Secondly, turning now to the rights of the victims, by definition plural since the obligation breached was established in relation to more than one state, or even to all, what were the rights of the states affected by this breach, and to what extent would those rights themselves vary according to the situation of the states concerned in relation to the obligation transgressed?

To draw up a balance sheet of its actions, accordingly, one must, as all participants in this colloquium have done, take stock of the answers offered to these two questions.

2 Is There a Differentiation of the Obligations on the Perpetrator State According to the Nature of the Obligations Breached?

We know today that the answer the ILC reached on this critical point is essentially in the negative, however unsatisfactory this may be in both theory and practice. However, in order to retrace the intellectual pathway and the substantive or political difficulties that led the ILC to this result, it seems useful to proceed in three stages: starting from the technical question of the relations between primary and secondary obligations in the law of responsibility, we go on to encounter, over and above the problem, insoluble in practice, of the criminalization of state responsibility, the need to assess the true effects of the elimination of the notion of crime; we end by considering a perhaps less radically negative balance sheet than it might at first have seemed, noting that, while the introduction of a twofold system for state responsibility in the end failed, the outlines of a differentiation of degrees of responsibility are perhaps discernible.

¹³ Particularly as regards attribution or reparation.

¹⁴ However, the provisions regarding the classically bilateral dimension of the responsibility relationship between a perpetrator and its individualized victim essentially concern a pure codification of existing custom. By contrast, it is on the multilateral dimension that the progressive developments have taken place.

A Primary and Secondary Obligations in the Law of Responsibility

It is unnecessary here to go back in detail over one of Roberto Ago's major contributions. He was certainly right, whether or not influenced by Hart's theories, to identify the law of responsibility as that of secondary obligations, in the sense that, being dependent, secondary obligations are only consequent upon breach of the primary obligation to act or refrain from acting. The confusions of the early stages of the codification work — wandering through the thickets of the obligations due from the state to foreigners — had shown how useful this clarification was.

Having said that, one cannot so readily, in the body of the codification, remove all references to a typology, however incomplete or sketchy, of the various types of primary obligations. This emerges particularly in two connections: the classification of wrongful acts and the categorization of those entitled to invoke the responsibility.

As regards the typology of wrongful acts, this was tackled by Ago in the first part of the draft. He based this, almost inevitably, on a classification of the obligations breached. There has in particular been much comment by scholars, in connection with Articles 20, 21 and 23 of the draft initially adopted in 1981 and essentially brought back in 1996,¹⁵ regarding the way Ago wished to take up again, while radically altering its scope, the distinction, classic as it is in 'continental' legal systems, between obligations of means and obligations of result.¹⁶ In the wake of its last Special Rapporteur, James Crawford, and under the joint pressure of many national delegations on the Sixth Committee¹⁷ as well as of the bulk of scholars, the ILC managed to abandon this lame distinction. It simplified its classification of wrongful acts without having recourse to the distinction between obligations of conduct, prevention and result, even though the final text, in Article 14(3), still refers to an 'international obligation requiring a state to prevent a given event'.¹⁸

In fact, it is less the relevance of this classification as such¹⁹ than its usefulness in connection with codifying the law of responsibility that was thus enshrined. In its previous draft, in fact, one of the most common criticisms of Articles 21–23 was that they were based on a typology which was difficult to interpret, though without drawing the precise normative consequences from that, in relation to the regime (or implementation) of responsibility for breach of this or that type of obligation. Another important distinction was instead maintained, inherited from the genesis if not the final version of the codification of the law of treaties: that between bilateral,

¹⁵ To which one should add Article 18(4) and (5) of the same draft.

¹⁶ On this distinction, see Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility', 10 *EJIL* (1999) 371; and Dupuy, 'Le fait générateur', *supra* note 10, at 44; as well as Combacau, 'Obligations de résultat et obligations de comportement: Quelques questions et pas de réponses', in *Mélanges offerts à P. Reuter, Le droit international, unité et diversité* (1992) 181 *et seq*; and Pauwelyn, 'The Concept of a "Continuing Violation" of an International Obligation, Selected Problems', 55 *BYIL* (1995) 415.

¹⁷ The legal committee of the UN General Assembly that annually considers the ILC's reports on its work.

¹⁸ See Crawford, Bodeau and Peel, 'La seconde lecture du projet d'articles sur la responsabilité des Etats de la Commission du droit international', 104 *RGDIP* (2000) 911.

¹⁹ Mentioned, moreover, in recent case law: ICJ, judgment of 25 September 1997 in the *Gabcikovo-Nagymaros Project Case*, ICJ Reports (1997) 77, at para. 135.

interdependent and integral obligations. Since, however, this concerns the determination of those entitled to sue for responsibility, it will be considered in the second part of this stocktaking.²⁰

B What Are the Effects of the Disappearance of the Notion of Crime?

As an extension of the foregoing question, a distinction has been maintained under various designations throughout the draft, a distinction that Ago instituted according to the importance allotted by the ‘international community as a whole’ to certain obligations in comparison with others. By definition, the question is whether the codification ought to introduce a distinction among obligations according to whether the breach is of the one type of obligation or the other.

In this connection, both the papers and the discussion at this colloquium have reached an almost identical conclusion, summarized in the ironical formula used by Eric Wyler: ‘the murder of crime does indeed look innocent.’²¹ What he meant was that, while the word may not have been kept, the thing certainly has, as Michel Foucault might have said. The word, the terrible word ‘crime’, undoubtedly had a symbolic power the first Special Rapporteur had not allowed for, especially since the term had already been used before to describe certain types of wrongful act, like genocide, apartheid or aggression. Whether or not the delegates to the Sixth Committee are readers of Dostoyevsky, the fact remains that crime spontaneously calls for punishment, that is, the specifically *criminal* responsibility of the culprit. But, as most notably an oversight by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Blaskic* case was to illustrate, states regard it as a prerequisite of sovereignty to be able themselves to escape all pursuit of a criminal nature.²²

In fact, the ‘thing’ has indeed remained long beyond the disappearance of the word. As Wyler has indeed been able to verify, there is essentially only a terminological modification between yesterday’s ‘crime’ on the one hand²³ and on the other the breach of obligations ‘owed to the international community as a whole’ mentioned in Article 48(1)(b) of the final text.

The apparent virtue of this substitution is that it allows the state’s responsibility to be detached from any criminal or penal connotation; over and above getting rid of burdensome symbolism, this terminological innovation may seem to justify better the absence in the part of the text on implementation of responsibility of any machinery inspired by the criminal procedures of domestic law,²⁴ or the introduction of some type

²⁰ See *infra* at 1065.

²¹ See Wyler, ‘From “State Crime” to Responsibility for “Serious Breaches of Obligations under Peremptory Norms of General International Law”’, 13 *EJIL* (2002) 1147.

²² The contemporary rise of criminal justice is, moreover, reinforcing instead of weakening this unique feature of sovereignty: for it reserves responsibility for crime to the individual, most often at the cost of a destatalization of the action, which is nonetheless carried out on behalf of the state as its agent. Milosevic was Yugoslavia, but it is not by judging him that the state’s responsibility is prosecuted.

²³ Article 19 in the first part of the draft adopted in 1981, then in 1996.

²⁴ With an equivalent of an international ‘public prosecutor’ placing the state responsible for infringing international *ordre public* in the dock.

of truly punitive penalty inflicted on that state. Yet what matters is still there: the duality of responsibility is proclaimed, according to whether the breach is of an ordinary obligation or of one deriving from peremptory norms.

One confirmation of the essential identity of crime and ‘serious breaches of obligations arising under peremptory norms of general international law’ is to be found in the fact that, despite what the apparently unambiguous definition of severity given in Article 40(2) of the final text might suggest,²⁵ we in fact remain attached to a combination of two aggravating factors, one purely substantive, having to do as the provision cited says with the perpetrator’s conduct, and the other specifically normative, as confirmed by the ILC’s commentary on the final text.²⁶ One therefore has to admit that Eric Wyler is right to find that the combination of substantive severity and circumstantial severity continues to be required,²⁷ just as in the good old days of state ‘crime’.

The terminological purge the ILC effected in the last stage of its work was, then, salutary but of limited scope. As Ago himself in fact said, ‘we are interested not so much in determining whether the responsibility . . . does or does not entail “criminal” international responsibility as in determining whether such responsibility is or is not “different” from that deriving from the breach of other international obligations of the State’.²⁸ By removing the criminal aspect, the final text retains the dual system of responsibility according to the nature of the obligation breached, but does not provide for different ways of implementing that responsibility.

In addition, the terminological simplification resulting from the elimination of crime has in part been negated by the appearance of a new disparity in the vocabulary used at two points in the text to designate what is really the same type of obligation. Though indeed considered from different angles, one from the viewpoint of content and the other of scope,²⁹ the ‘obligations arising under a peremptory norm of general international law’ mentioned in Article 40 are equally ‘owed to the international community as a whole’, as mentioned in Article 48(1)(b).

The ILC finally decided to remove this persisting imprecision in Ago’s work.³⁰ There

²⁵ ‘A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.’

²⁶ Commentary to Article 40, UN Doc. A/56/10, para. 1: ‘Article 40 . . . establishes two criteria in order to distinguish serious breaches of obligations under peremptory norms of general international law from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies the intensity of the breach, which must have been serious in nature.’

²⁷ See Wyler, *supra* note 21.

²⁸ Ago, Fifth Report, *ILC Yearbook* (1976) vol. II, Part One, at 33, para. 101, n. 154.

²⁹ *Ratione materiae*.

³⁰ As Eric Wyler recalled, the ILC, following its Special Rapporteur, itself seemed hesitant as to the degree of consistency among the various notions concerned: ‘It can be accepted that obligations whose breach is a crime will “normally” be those deriving from rules of *jus cogens*, though this conclusion cannot be absolute.’ *ILC Yearbook* (1976) vol. II, Part Two, at 120, para. (62). See Gaja, ‘Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts’, in J. H. H. Weiler, A. Cassese and M. Spinedi (eds), *International Crimes of States: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (1989), at 273–274.

followed a long doctrinal controversy as to the degree of consistency between obligations *erga omnes*, peremptory norms and international crimes. The ILC appeared now to understand that these were merely designations for the same thing from different viewpoints.³¹ One might therefore ask whether the ILC did not go too far. Having eliminated crime in order to give its reality the label ‘serious breach of obligations arising under a peremptory norm of law . . .’, it ought equally to have called it the same thing when identifying those entitled to implement it. In the July 2000 interim draft, the ILC had, moreover, effected a harmonization by reducing the terminology to the common denominator of ‘serious breach of obligations towards the international community’. It is annoying that, undoubtedly under pressure from certain delegations on the Sixth Committee, it had to revise a text that was more coherent in its 1996 version than in its final form.

The fact remains that the discussions held at this colloquium, including the exchanges with the three eminent members of the ILC who agreed to join us, confirmed the bulk of participants in the view that the forced equivalence between norms of *jus cogens* and obligations *erga omnes* undoubtedly raised more questions than it solved. For if the former always entail the scope of the latter, the converse is not true. As Alain Pellet recalled, many commentators today are agreed that there are obligations towards all, such as respect for the freedom of the high seas, which since they permit possible compromises are not peremptory norms. Be that as it may, this debate is important from the viewpoint of the rights of victims (which we shall consider below), but it remains marginal as regards the possible diversification of the forms of the obligation on the perpetrator.

C Is the Failure of the Diversification of the Provisions for Obligations on the Perpetrator State According to the Type of Obligation Breached a Complete or a Relative Failure?

During the period when Professor Arangio-Ruiz was the Special Rapporteur, the ILC had boldly endeavoured, following his lead, to draft responsibility provisions specific to the consequences of the crime.

In accordance with an openly penalist conception of this type of responsibility, it was envisaged that the guilty state would undergo deliberately punitive or ignominious consequences as a result of its ‘crime’. It might therefore be condemned to *restitutio in integrum* instead of compensation, even if this was ‘out of all proportion to the advantage the injured state would gain from obtaining restitution in kind rather than compensation’. It was also liable to have its ‘dignity’ attacked, possibly even going so far as to ‘seriously threaten its political independence or economic stability’.³²

This responsibility was both a derogation from and an addition to the application of

³¹ Those of the addressees of the obligation, its substance and the description of its breach respectively.

³² This resulted, in the terms of Article 52(a) of the 1996 draft, from the derogation from the ordinary rules of reparation laid down in Articles 43(c) and (d) and 45(3) of the same draft respectively.

the ordinary rules of responsibility;³³ this leads one to think, moreover, that the distinction between responsibility for crime and ordinary responsibility was always thought of more in terms of degree than kind, of aggravation rather than a true dichotomy.

But, as Christian Tams has recalled, the commentaries evoked from a number of states³⁴ rapidly confirmed that this attempt to institute international penalties liable to be inflicted on the criminal state was out of line with international custom. It was also out of the question for it ever to be accepted by later practice,³⁵ notably because of its manifest political unrealism.³⁶

According to Pierre Klein's analysis, the same was true *a fortiori* of the conditions under which the proposals of a procedural nature brought before the ILC by Rapporteur Arangio-Ruiz in his Seventh Report were rejected.³⁷ The various UN organs, the Security Council, General Assembly and International Court of Justice, were to collaborate on building up a genuine international criminal trial of the criminal state, first accused by the Security Council or the General Assembly and then judged by the Court, so as to become subject to the special provisions governing the consequences when a state is found guilty.

It must not, by the way, be forgotten that, under the same provisions, this state would additionally be subject to countermeasures decided collectively but implemented individually by each state injured by the perpetration of the crime.

These institutional proposals, which were considered unrealistic right from the stage of internal discussions at the ILC, were never incorporated into the draft adopted in 1996. It would, however, be wrong to believe that presenting them to the ILC was — like adoption of the provisions of Article 52 cited in the 1996 draft — merely a futile act. Both of the proposals were in fact deliberately furnishing, almost to the point of absurdity, proof of the emptiness of a normative claim to introduce authentic criminal responsibility for state crimes. Thus the proposals demonstrate the central failing of the whole codification effort in this area, that is, the manifest gap between normative advances and institutional inertia.

It is of course the case that, at various periods in the history of the United Nations, countries such as South Africa, Rhodesia or more recently Libya and Iraq have been the object of 'sanctions' decided and coordinated by the Security Council. For Iraq, in the euphoria, by definition transient, of the rediscovery of the 'international community' and the United Nations, things went very far, to the point of establishing

³³ The old Article 51 of the 1996 draft in fact stipulated that 'an international crime gives rise to all the legal consequences resulting from any other internationally wrongful act, and in addition all the further consequences set forth in Articles 52 and 53 below'.

³⁴ See particularly the UK response, UN Doc. A/CN.4/488, at 139–140.

³⁵ See Tams, 'Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?' 13 *EJIL* (2002) 1161.

³⁶ See Klein, 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law', 13 *EJIL* (2002) 1241.

³⁷ Arangio-Ruiz, Seventh Report on State Responsibility, *ILC Yearbook* (1995) vol. II, Part One, especially at 48 *et seq.*, paras 245 *et seq.*

an institutionalized system, derogating strongly from the ordinary law, aimed at ensuring reparation for the damage inflicted by the ‘crimes’ of aggression or the massive damage to the environment³⁸ attributed to Saddam Hussein’s regime.³⁹

More recent practice shows, however, that measures of this sort were a thing of their time, if only because of the Security Council’s abstention in relation to the perpetration of war crimes and crimes against humanity in various regions of the world that everyone knows but can hardly dare to mention, at the risk of seeming ‘politically incorrect’.⁴⁰

In other words, the discretionary room for evaluation that states intend to give themselves, starting from the most powerful among them, particularly the permanent members of the Security Council, is and will remain utterly and totally incompatible with the introduction, or *a fortiori* the definitive institutionalization, of a special responsibility of the state guilty of an attack on what the old Article 19 called an ‘obligation . . . essential for the protection of fundamental interests of the international community’. The ‘crime’ and its substitutes remain a formidable political weapon, which certain states intend to retain mastery of without undergoing the constraints that any institutionalization of responsibility would risk introducing.

Does that mean, though, that the law of responsibility offers no means of increasing responsibility in certain situations? It would undoubtedly be going too far to reply with an unqualified affirmative. Some recent trends in this connection should be noted.

The first possibility of increasing the obligations on the responsible state corresponds to what the English-speaking tradition calls ‘punitive damages’, i.e. imposing on the perpetrator a manifestly heavier compensation burden than would strictly be justified by the quantifiable material damage. The second trend concerns the imposition of assurances and guarantees of non-repetition.

In reality, as Christian Tams has shown, neither of these cases is necessarily associated with implementing responsibility for crime. Punitive compensation, as employed in the *Rainbow Warrior* case against France for the damage caused to New Zealand, was in fact justified by the severity of the wrongful acts committed by that country. Yet no one ever claimed that these acts went so far as to amount to what the ILC today calls a ‘severe breach of obligations arising under peremptory norms of general international law’. Moreover, Tams’ survey of the case law confirms that an *opinio juris* that the practice of punitive damages is part of customary law is far from being established.

As regards assurances and guarantees of non-repetition, this in fact covers two very different cases (now rather artificially combined in the text of Article 30). Their only

³⁸ The two types of ‘crime’ cited in the non-exhaustive list of crimes proposed in the old Article 19(3) of the draft.

³⁹ See Dupuy, ‘Après la guerre du Golfe’, 95 *RGDIP* (1991) 621, at 635.

⁴⁰ To be quite explicit, I refer here to the many cases where Israel, in particular, manifestly ignored certain of the most elementary principles embodied in the fourth Geneva Convention on the protection of civil populations in armed conflict. But there is more than a serious presumption that the same principles have also been ignored by US forces, particularly in pursuit of their military operations in Afghanistan long after the end of 2001.

point in common lies in the fact that neither can be directly associated with the commission of a crime, whatever terminology one applies. Apart from the fact that one may dispute its forming part of reparation properly so called, placing the perpetrator state under an obligation to cease and desist from the wrongful act depends on the nature of the damage caused (which must be continuous), not of the obligation breached. The judgment handed down by the ICJ in the *LaGrand* case, taken together with the wording of Article 30(2), allows us to say that today assurances and guarantees of non-repetition are indeed a rule of positive law; the fact remains that invoking these will depend on the nature of the breach but not necessarily any longer on its severity, in the two senses used by Article 4.2 and its commentary (substantive and circumstantial severity).⁴¹

The balance sheet of almost 40 years of work by the ILC on responsibility, largely dominated by the growth and strength of 'multilateralism' and the gallows figure of the 'State crime', is thus highly paradoxical. Indeed, considered from the viewpoint of the obligations on the state guilty of such an attack on international *ordre public*, the system established makes no real distinction between a state's responsibility for breach of peremptory norms (by definition always also *erga omnes*) and for ignoring its 'ordinary' obligations.⁴² From this viewpoint one would almost be tempted to talk about a failure of the codification, comparing the final outcome with the premises on which the ILC's work was based. The ILC had in fact in its 1976 report strongly stressed that 'it would be absolutely mistaken to believe that contemporary international law contains only one régime of responsibility applicable universally to every type of internationally wrongful act, whether more serious or less serious and whether injurious to the vital interests of the international community as a whole or simply to the interests of a particular one of its members.'⁴³

The failure of the codification, albeit partial and relative, does not, however, necessarily imply a failure of the codifiers, who start from theoretical premises but must take into account political realities. As we shall see below, many weaknesses in the codification derive from the very fact that, in large part, the former have not met with the hoped-for expansion in the latter.

From there to concluding that the mountain of the crime has not even given birth to a normative mouse is only a step, which we shall not take, at least not without first verifying what the effects are of a severe breach of obligations deriving from peremptory norms on the *rights* of the states they affect.

⁴¹ See *supra*, at 1061.

⁴² Or 'intersubjective' in the sense that they are classically set up between subjects of law.

⁴³ *ILC Yearbook* (1976) vol. II, Part Two, at 117, para. (53), quoted in *ILC Yearbook* (1982) vol. II, Part One, at 26, para. 27.

3 Is There a Difference in the Rights and Obligations of States According to the Nature of the Obligations Breached?

In terms of the concept of responsibility adopted on the initiative of Roberto Ago, the legal relationship established by an invocation of state responsibility has greatly increased since it was first established. This was because, first, the ILC brought within the framework of responsibility the rights and obligations of the states affected as well as the duties of the state responsible.⁴⁴ Secondly, it was because of the fact that the obligation breached affected not one but several states, or even in certain cases *all* other states, where the obligation breached involved 'a peremptory norm of general international law'.

Two problems the ILC constantly grappled with throughout its work were, first, the identification of the states concerned, and, secondly, the content of the rights, and subsidiarily the obligations, of those states. The need to solve the first of these two problems was all the more important because it proved very difficult, though not impossible, to rely on a consistent response by the international community to an attack on its interests. The institutional mirage that long encouraged the promoters of the concept of crime dissolved without trace, thus leaving the response by injured states (once these had been identified) partly undetermined though not uncontrolled.

A *The Institutional Mirage*

Nolte recalls the idea developed by Grotius that 'kings . . . have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any person whatsoever'.⁴⁵ However, after the two world wars of the twentieth century, this idea naturally led to one conclusion: the response to breaches of common values ought now to be transferred from states acting individually to a collective, rational, centralized organization, such as the defence of international *ordre public* requires. The multilateralization of interests ought logically to be reflected in an institutionalization of the ways of defending such interests. Such a mechanism was established in 1945 to promote security, which had now become collective. For Ago, the point was ultimately, through the establishment of the 'State crime' in Article 19 of his draft, to make respect for obligations that are 'essential for the protection of fundamental interests of the international community'⁴⁶ part of the normative and institutional arrangements originally established with an eye to the pragmatic objective of maintaining peace.

In the mid-1960s, when considering the question of responses to a 'crime', the Special Rapporteur perceived at the outset the dangers of a concept that would allow for individual responses to this type of breach. His proposal was therefore to combine,

⁴⁴ See *supra*, at 1057.

⁴⁵ Grotius, *De jure belli ac pacis* (1625), second book, chapter XX, at XL.

⁴⁶ The terminology used in Article 19(2) of the first part of the draft, adopted in 1981 then reintroduced in 1996.

to the point of blending them into a single category initially called 'sanctions', those measures or 'countermeasures' taken individually or collectively by third parties outside any pre-existing institutional framework, and those measures that could be taken by an organization like the UN, applying the powers allotted to it by its founding Charter.⁴⁷

He favoured the former over the latter. It was for him normal for 'a community such as the international community, in seeking a more structured organization' to turn 'towards a system vesting in international institutions other than States the exclusive responsibility, first, for determining the existence of a breach of a obligation of basic importance to the international community as a whole, and thereafter, for deciding what measures should be taken in response and how they should be implemented'.⁴⁸

Ago's collaborator in drafting his successive reports, Marina Spinedi, has considerable practical knowledge of the ILC's work on responsibility during the drafting of the first part of Ago's draft. And she has rightly dwelt, at the end of her paper, on the fact that from the 1960s to the 1980s not just Ago but the majority of ILC members did not really conceive of actions by states 'not directly injured' as being outside an institutional framework. Spinedi says: 'Regarding the countermeasures that states not directly affected by the wrongful act could take on the basis of international law in force, Ago referred chiefly to the measures provided for in Chapter VII of the Charter. This view was shared by most ILC members.'⁴⁹ We thus have to understand the ideological and doctrinal risk the ILC was taking at the time, despite the scepticism of a few of its members, among them Paul Reuter.⁵⁰ The risk lay in the fact that the ILC conceived the normative advance constituted by the concept of crime as necessitating a corresponding institutional enhancement, but at the same time considered that there was no need to amend the Charter: the concept of crime as contemplated by the ILC in 1976 could be dealt with by Chapter VII extended to the defence of all 'essential obligations'.

The project thus took on a political dimension. By the same token, it brought about a confrontation between the internationalists' dream and the harsh realities of international relations. In fact, in a three- or four-year period immediately following the Gulf War, we did see a stage where the Security Council seemed to be acting, in the light of a very broad conception of maintenance of peace, in defence of the interests and even more so the values held to be those of the 'international community as a

⁴⁷ On these points, see Alland, 'Countermeasures of General Interest', 13 *EJIL* (2002) 1221 above; Leben, 'Les contre-mesures interétatiques à les réactions à l'illicite dans la société internationale', 28 *AFDI* (1982) 9; Dupuy, 'Observations sur la pratique récente des sanctions de l'illicite', 87 *RGDIP* (1983) 505.

⁴⁸ Ago, Eighth Report on State Responsibility, *ILC Yearbook* (1979) vol. II, Part One, at 43, para. 91.

⁴⁹ Spinedi, *supra* note 5, at 31 (manu).

⁵⁰ See especially *ILC Yearbook* (1976) vol. I, at 245.

whole'. This point has been noted by several observers.⁵¹ Be that as it may, the progressive crumbling of United Nations authority in the Balkans affair, and its ultimate rejection by the military allies during the 1999 Kosovo crisis, clearly shows a marked tendency by the strongest states to have recourse to force *outside* the United Nations framework, and hence *a fortiori* no longer to recognize the Security Council as the political authority exercising the legal and moral authority of a promoter of obligations essential to the safeguarding of the interests of mankind. In June 1999, the Security Council's return to grace with the adoption of Resolution 1244, organizing the reconstruction of Kosovo under its direction, formed part of a different logic — the management of the aftermath of crisis. But it was especially the follow-up to the events of 11 September 2001 that confirmed the vertiginous rise in the power of the United States as the hegemonic power, and, as Robert Kagan has explained, one increasingly disinclined to allow the international institutions, and the United Nations in particular, to play the part of the principal defenders of international *ordre public*.⁵² This indeed seems to be a structural fact with roots going back to the historical 'continental drift', with the US on one side and Europe on the other . . .

Nonetheless, one can of course claim that these developments are reversible, though probably only partially or temporarily so. It is the very vulnerability and essentially fluctuating nature of the United Nations' commitment, particularly by the Security Council, to the defence of collective interests and the inconsistent way it condemns some breaches of obligations arising under peremptory norms while ignoring others of equal severity, that stifles the possibility of pursuing the dream of the initial codifiers of responsibility for crimes. Its institutionalization will always remain partial (for otherwise it would be impossible), and its functioning will be too haphazard to be able to form the basis of a legal system, even if those bases are obviously the most rational ones.

In these circumstances, the technical task of determining which states were *entitled* to implement the responsibility of the wrongdoing state for international *ordre public* became all the more important, from both a political and a legal viewpoint. Given the likely absence of the institutional aspect, the 'relational' aspect in the sense used by René-Jean Dupuy regained its importance. Since the function of promoting and defending obligations (and values) essential to the 'international community as a whole' could not be adequately or impartially undertaken by the main peacekeeping body, the Security Council, or any other representative body of the community, it remains a makeshift, the hazards of which though considerable nonetheless do not seem necessarily greater than the arbitrary exercise of discretionary power by the Security Council.

⁵¹ See especially Gaja, 'Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial', 97 *RGDIP* (1993) 297–320; cf. P. Picone, *Interventi delle Nazioni Unite e diritto internazionale* (1995) 517–578; Schacter, 'United Nations Law in the Gulf Conflict', 85 *AJIL* (1991) 452–475; Dupuy, *supra* note 39; and especially Dupuy, 'Sécurité collective et organisation de la paix', 97 *RGDIP* (1993) 617, continued in 'Le maintien de la paix', in R.-J. Dupuy (ed.), *Manuel sur les organisations internationales* (2nd ed., 1998) at 563–603, especially at 593–598.

⁵² Kagan, 'Power and Weakness', *Policy Review* (2002) No. 113.

B Those Entitled to Invoke Responsibility

The balance sheet of several decades of work by the ILC seems both positive (particularly because of the considerable improvements brought on the initiative of the last Special Rapporteur) and marked by certain continuing terminological, if not conceptual, difficulties. Two points in particular should be noted: on the one hand, the persistent meanderings of the ILC in relation to how it describes the states concerned by an action for responsibility; on the other hand, the partial indeterminacy of the rights of the states affected.

The determination of the 'injured states' is, more than anything else, the most direct point for bringing multilateral obligations into the international law of responsibility. The solution to this problem requires one to take certain theoretical and technical options that seem initially to have embarrassed Riphagen, and to a lesser extent his successor Arangio-Ruiz. Riphagen distinguished those entitled to sue for responsibility according to whether they were 'directly' or 'indirectly' injured. This approach can be criticized in particular for confusing the nature of the interest attacked with the intensity of the attack. Arangio-Ruiz for his part proposed a draft that betrayed his reluctance to conceive of the responsibility relationship outside the strict bilateral relationship between the state responsible and the state injured.

This perception was presumably itself bound up with the affirmation of the principle of what Alexandre Sicilianos has called 'the "exact" correlation between the breach of an international obligation of a state and the injury to the subjective right of another state'.⁵³ But though true in the majority of cases, this position is not necessarily the only one possible, especially, as Sicilianos notes, in human rights matters. It is no exaggeration to say that the drafting of Article 40 in the 1996 draft reflected an essentially bilateral view of the law and of international society, in which the communitarian, multilateral dimension bequeathed by Ago accordingly had increasing difficulty in finding a place.

It is presumably this doctrinal hiatus that was the cause of the cumbersome drafting of Article 40 in the 1996 draft. Its second paragraph in particular got lost in the labyrinth of an enumeration of the cases in which the 'injured State' was to be uniquely identified by reference to the source of the 'right' infringed by another's wrongful act, whether a bilateral treaty, a legal decision or a 'treaty provision in favour of a third State'.

Subsequently, in paragraph 2(e), came a lengthy list grafted onto the previous one, seeking to set out the conditions in which a right with its origin in a multilateral rule⁵⁴ could be 're-bilateralized' (if we may call it that) so as to give its bearer an interest in an action for responsibility. Once again, this search was done with many approximations, since we find mention of rights created 'for the protection of human rights and fundamental freedoms'; yet the essence of human rights comes from the fact that, by being beyond the interplay of reciprocity, they are by definition resistant to a

⁵³ See Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility', 13 *EJIL* (2002) 1127.

⁵⁴ Be it a treaty of the same name or a customary rule.

strictly bilateral perception, and in any case are not inter-state things, since the beneficiary of the right is an individual, independent of ties of nationality.

Finally, as a stopping place in this listing — or rather a sort of kicking for touch, since it has to be seen as the final throes of bilateralism — the late Article 40 indicated that: ‘In addition, “injured State” means, if the internationally wrongful act constitutes an international crime, all other States’, so that all states are to be regarded as injured states. This is both true and inadequate. They are injured, to be sure, but not in the same way, which explains why they do not all, by contrast with what the paragraph seemed to suggest, necessarily have the same rights to sue for responsibility.

The foregoing analysis should not be seen as an expression of obsessive criticism against a provision that the majority, on both the Sixth Committee and the ILC itself, very quickly became aware had to be amended.⁵⁵ If nonetheless it is after so many years appropriate to return to the scene of this baroque monument to the glory of the unknown injured state, this is because it did mark the place where two conceptions of international law came together: one inherited from the *Lotus* case and the coexistence of juxtaposed equal sovereignties; the other, which it must be admitted was indeed set into Article 19 in the first part of the draft, by contrast taking note of the paradoxical affirmation of a community each of whose members shared an interest in respect for a number of cardinal rules.⁵⁶

It is unquestionable that the ILC considerably straightened the helm in the last two versions of its draft, to arrive finally at a relative clarification of the gradation of the rights the various categories of state affected by a breach of a multilateral obligation have according to the origin and status of the obligation. It is a pity though that it did so at the cost of maintaining a technically inappropriate legal terminology and several approximations. Since on the whole I share Alexandre Sicilianos’s brilliant analysis,⁵⁷ I shall not go back over the details of this matter here, confining myself instead to a few simple observations.

The first observation is to note that the ILC was able to get out of the rut of the old Article 40 by designating the ‘injured State’ on the basis of the features of the primary obligation breached (and not, as it had previously done, in terms of the origin of the rights called into question by the wrongful act). There was a new conceptual coherence here. It allowed the uncertain enumerations in the old Article 40 to be avoided.

The second observation is that, by starting specifically from the obligations breached, the classification now established among the various types of right to take

⁵⁵ See especially Crawford, Third Report on the International Responsibility of States, A/CN.4/507, paras 66–67. See also Frowein, ‘Reactions by Not Directly Affected States to Breaches of Public International Law’, 248 *RCADI* (1994-IV) 345, at 349–350; Dominice, ‘The International Responsibility of States for Breach of Multilateral Obligations’, 10 *EJIL* (1999) 353.

⁵⁶ Seeking to bring in a little humour to a very austere subject, a freedom one may perhaps take at least in a footnote, one might say that the 1996 Article 40 was a snapshot of the steamer *Lotus* approaching the communitarian iceberg . . . And we know what comes of that type of encounter.

⁵⁷ See Sicilianos, *supra* note 53.

action was based on a distinction developed for the needs of the codification of the law of treaties, the paternity of which is consensually attributed to Sir Gerald Fitzmaurice.⁵⁸ This is the distinction between bilateral obligations, interdependent obligations and integral obligations. As regards this fruitful classification, only partially exploited in the text of the Vienna Convention, we should recall one particularly relevant observation by Paul Reuter:

the whole area [of conventional acts] is arranged around two poles of influence: the world of contract, conceived in terms of antagonistic wills coming to rest at a point of equilibrium . . . and founded upon equivalence, reciprocity and item-by-item performance; and the world of the law, constructed legally on the hypothesis of the search for and defence of a common interest, where the wills involved are the instruments, and the basis is more a collective will than a balance of individual wills.⁵⁹

But, in its substantively legislative dimension, the treaty, just because it meets the collective or common interest of which the *Triepel Vereinbarung* supplied the first approximation, often proves much less dependent on the reciprocity than was necessary for its conclusion. However, we must continue the analysis.

If one engages, as the ILC did in its later drafts, in considering and classifying treaties according to the type of obligations they set up, one will see first that, alongside the synallagmatic obligations already met with, there are other obligations having more to do with a sort of 'global reciprocity';⁶⁰ this comes into play among all the parties to a multilateral agreement, whether universal or more limited. As regards 'interdependent obligations', Sir Gerald Fitzmaurice said, regarding their implementation by each party, that implementation was conditional on corresponding performance by all the parties, such that in the case of a fundamental breach by one party, the obligation of the other parties would not merely cease towards the particular party, but would be liable to cease altogether and in respect of all the parties.⁶¹ To illustrate this conventional solidarity, Paul Reuter refers to Article 60(2) of the Vienna Convention.⁶² This provision in fact applies to the rights of parties to a multilateral treaty, *ipso facto* affected by a breach of that treaty by one of them. Since each party is bound in relation to all of the other parties, reciprocity reaches its highest stage in the context of interdependent obligations. Disarmament conventions, those prohibiting certain weapons or methods of warfare, agreements demilitarizing certain regions or those banning fishing in certain sea areas, are the most topical examples.

There is also another type of agreement where, while formal reciprocity (associated with the act) still exists, it by contrast disappears entirely from the normative part of

⁵⁸ See Frédérique Coulée, 'Droit des traités et non-réciprocité: recherches sur l'obligation intégrale en droit international public' (thesis, Université Paris 2, 1999, forthcoming from Editions Bruylants in 2003).

⁵⁹ Reuter, 'Principes de droit international public', 103 *RCADI* (1961-II) 425, at 562–563. See also M.E. Villiger, *Customary Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (2nd ed., 1997) 110.

⁶⁰ A term employed by Sicilianos, *supra* note 53, at 1135. On this concept, see the typescript thesis by Frédérique Coulée, *supra* note 57, especially at 7.

⁶¹ *ILC Yearbook* (1958) vol. II, commentary on Article 19, at 44, para. 91.

⁶² Reuter, 'Solidarité et divisibilité des engagements conventionnels', in Y. Dinstein and M. Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 623.

the treaty as such. Returning to the definitions offered by Sir Gerald Fitzmaurice, we immediately understand the distinction he drew between an ‘interdependent obligation’ and an ‘integral obligation’. By contrast with the former, the latter is altogether independent of performance by any of the others, and would continue for each party even if defaults by others occurred.⁶³ The Special Rapporteur even went so far (too far?) as to add that this concerned an obligation towards the whole world rather than an obligation towards the parties to the treaty. But there is a need to distinguish carefully here according to the source of the obligation, depending on whether it is conventional and is set up only among the parties (*obligatio erga omnes partes*) or whether it has its origin in a rule of general international law (thus becoming, *stricto sensu*, an *obligatio erga omnes*). In general, as an illustration of agreements that set up integral obligations (‘integral treaties’), human rights treaties are cited, as are, among many others, the two UN Covenants (on civil and political rights and economic, social and cultural rights).⁶⁴

The last Special Rapporteur on the law of state responsibility, James Crawford, was able to turn this classification to account, and move beyond the strict framework of the law of treaties to include the integral obligations of general international law. We find this in particular in the identification of the ‘injured States’ according to the new conception of Article 42. In particular, it distinguishes among these according to whether the obligation is owed to ‘that State individually’⁶⁵ (the case of bilateral obligations) or whether its breach 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’⁶⁶ (the case of interdependent obligations). The breach of integral obligations, for its part, is to be found in Article 48, in the two kinds, restricted and general, of obligations *erga omnes partes* and obligations *erga omnes* absolutely, if one may so put it, with the first having their origin in treaties, the latter in customary obligations.⁶⁷

This new structure is clearly much superior to the one proposed in the old Article 40, since, even if seen from the viewpoint of victims’ rights, the responsibility of a state continues to find its origin in the breach of an obligation by the state that *answers* for these acts. One should therefore start with a classification of obligations according to

⁶³ *ILC Yearbook* (1958) vol. II, commentary on Article 19, at 44, para. 91.

⁶⁴ We know, moreover, that human rights specifically have an ‘objective’ nature, such that the provisions for their application are above the interplay of reciprocity or, if one prefers, the sanction for non-performance codified in Article 60 of the Vienna Convention on the Law of Treaties. If Turkey breaches rights under the European Convention on Human Rights domestically, that does not free the other states parties to the Convention from the obligations under the Convention, even in relation to Turkish citizens within their territorial jurisdiction.

⁶⁵ Article 42(a) of the final text.

⁶⁶ Article 42(b)(ii) of the final text.

⁶⁷ Which may of course on occasion be found in treaties ‘declarative’ of existing custom, as is the case with the 1948 Convention on the Prevention and Deterrence of Torture.

the way they are applied, and not of the rights infringed by their breach, which are necessarily initially conditioned by the morphology of the obligation.⁶⁸

However, the proceedings of this colloquium have also shown the rocks that this last stage of codification struck, rocks which one might have thought could have been avoided. In its concern to mark the difference between the respective rights of states affected by the breach of a primary obligation, the ILC ended up by distinguishing the invocation of responsibility by the 'injured States', which comes under Article 42 only, and the invocation of responsibility by 'a State other than an injured State', which comes under Article 48.

In so doing, it was ultimately manifesting the disquiet it had felt after discussing Riphagen's reports, where one felt that the distinction between 'States directly injured' and States injured 'indirectly' at least had the merit of recognizing that all those likely to invoke responsibility are indeed injured, even if in different ways.

In reality, it is clear that one can find the existence of a state's right to invoke responsibility against another state only if the former has a legal basis for bringing such an action.⁶⁹

From a terminological if not conceptual viewpoint, it is unconvincing to claim, or at least to risk having it believed, that a state can invoke responsibility when it has not been injured. All states are injured: the former because they have undergone damage⁷⁰ affecting their subjective rights (and here we again find the classical theory that goes back in particular to Anzilotti); the latter because they have suffered harm which will most often be exclusively legal, based on the fact that, as members either of a limited contractual community (in cases of breach of obligations *erga omnes partes*) or of the international community as a whole (for breach of obligations *erga omnes* unrestrictedly), they have first and foremost a legal interest in respect for a right of which they are themselves bearers.

I had thought of saying that the first case concerns states injured in their subjective rights, and the second case concerns states injured in their objective interests.⁷¹ Great Britain had a subjective interest in the re-establishment of its full sovereignty over the Falkland Islands in 1982; by contrast, as they showed by their conduct, the member states of the European Community, Canada and Japan, for their part, had an interest of a different nature, that is, respect for the objective legality constituted by the rule of non-recourse to force, forbidding the military conquest of the territory of a foreign state.

There is obviously no question of claiming that James Crawford, and following him the ILC members, failed to see the problem. Quite the contrary. Iain Scobbie recalled

⁶⁸ Here we see, from a different viewpoint, the relationship mentioned earlier between primary and secondary obligations, arising from the ignoring of the former. See *supra*, at 1059.

⁶⁹ Dupuy, 'Le fait générateur', *supra* note 10.

⁷⁰ Which always involves a non-material, legal feature (infringement of a right), along with, possibly, a material aspect. Hence the diversification in modes of reparation, at least apart from the ideal form of *restitutio in integrum*, which simultaneously covers both the legal damage or harm and, if necessary, material damage.

⁷¹ Dupuy, 'Le fait générateur', *supra* note 10.

the Special Rapporteur's point that '[w]e cannot make progress in developing the idea of a public international law ... unless we distinguish between the primary beneficiaries, the right holders, and those states with a legal interest in compliance'.⁷² The regret does not concern the correctness of the legal analysis, but rather the clumsiness of the terminology, which is inappropriate to the reality it designates. But a codification text once drafted takes on a life of its own, escaping from the custody of its authors, whose wisdom will not necessarily be shared by the later users of the text. This terminological indeterminacy, which could very well have been avoided by adopting either the formulation proposed above⁷³ or some other one,⁷⁴ is all the more regrettable because the ILC in fact saw very well that there could be different types of harm brought about by the wrongful act, and as a consequence different types of rights exercised by one category of injured state or another.

Though not essentially impairing the quality of the whole of the final text, this state of affairs is nonetheless all the more regrettable since on the occasion of the very last polishing of the final text, the ILC opted, presumably partly under pressure from some delegations on the Sixth Committee, to make certain conceptual categories, that in fact only partially overlap, coincide.

This was notably the case for the equivalence set up between 'obligations arising under a peremptory norm of general international law'⁷⁵ and obligations *erga omnes*.⁷⁶ One cannot in fact content oneself with saying, as the ILC's commentary does, that the former are seen from the viewpoint of their scope and 'priority' it is appropriate to allot them,⁷⁷ while 'the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance'.⁷⁸ This observation is certainly true. However, it in no way justifies the absolute normative equivalence that seems to be set up between the one and the other. Here once again we can join the critical comments by Alexandre Sicilianos, when he says that '[o]bligations *erga omnes* and those resulting from peremptory norms form two concentric circles, the first of which is larger than the second', and that confusing them risks harming the 'conceptual clarity of the whole system of "serious" breaches of international law'.⁷⁹

In particular, we do not know whether the right of all states to invoke responsibility against a perpetrator state is concerned only with the fact that the obligation ignored

⁷² Crawford, 'Responsibility to the International Community as a Whole' (Fourth Annual Snyder Lecture, April 2000, Bloomsbury School of Law, Indiana University, [www.law.cam.ac.uk/rcil/Snyderlect00\(f\).doc](http://www.law.cam.ac.uk/rcil/Snyderlect00(f).doc)); and his Third Report on the International Responsibility of States, A/CN.4/507, para. 84.

⁷³ States injured in a subjective right versus states injured in an objective right. It may be thought, for partly ideological reasons, that the expression 'objective right' might have met with opposition from certain national delegations on the Sixth Committee.

⁷⁴ If only by talking of states 'individually' or 'not individually' injured. Cf. Sicilianos, *supra* note 53.

⁷⁵ Mentioned in Article 40.

⁷⁶ Mentioned in Article 48(1)(b).

⁷⁷ UN Doc. A/56/10, at 281, para. (7).

⁷⁸ *Ibid.*

⁷⁹ See Sicilianos, *supra* note 53, at 1137.

was *erga omnes*,⁸⁰ or whether in the ILC's conception the generality of this right to action presupposes that the obligation *erga omnes* in question also has a peremptory nature; this is the case, for instance, for the ban on torture, according to the judgment of the International Criminal Tribunal for the former Yugoslavia in the *Furundzija* case.⁸¹

It is here that the notion of the 'severity' of the offence⁸² proves inadequate. This is all the more so since the criterion of severity of the breach, though appearing in Articles 40 and 41, which concern specifically the ignoring of peremptory law, is by contrast absent from Articles 48 and 54, which concern *only*, dare one say, obligations *erga omnes*.⁸³

Yet who would claim that a minor breach of an obligation *erga omnes*, perhaps not even peremptory, could justify in positive law the taking by all states affected, including those the ILC saw fit to call non-injured, of the whole range of measures associated with the implementation of the rights they hold *vis-à-vis* the perpetrator state? In this connection, the final text is less explicit than the 1996 version, which bound up the 'universalization of relations of responsibility'⁸⁴ specifically (and only) with the commission of a crime, a concept defined explicitly in terms of substantive severity. Here we see one of the most troublesome consequences of the dropping of a word which was still to be found in the transitional version in July 2000. The latter had the advantage of using a single expression, 'obligation owed to the international community as a whole'. It used it to designate cases concerning both what it was already calling the 'injured States', and states that are not injured but which nonetheless have a right to act in defence of those obligations.

In these circumstances, as Iain Scobbie notes, 'the Articles' recognition of the entitlement of all states to invoke the responsibility of another state's breach of an obligation owed to the international community as a whole ... is fairly modest'. It must be set within the context of other secondary norms of general international law,⁸⁵ and the conditions for an *actio popularis* in international law remain, today as previously, thoroughly imprecise.⁸⁶

The issue is intrinsic to responsibility law and to determining those entitled to invoke responsibility. But the issue goes further and ultimately concerns the whole legal status of *jus cogens* and the question of how specific are the provisions concerning *jus cogens*. If a breach of peremptory rules (as well as having no specific effect on the provisions regarding the secondary obligations of the perpetrator state) has no effect

⁸⁰ If devoid of a peremptory character, as is the case for the principle of the freedom of the high seas; see also the other examples noted particularly by Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"', 13 *EJIL* (2002) 1201.

⁸¹ Judgment of the Chamber of First Instance of the Tribunal, 10 December 1998.

⁸² As we saw above, it apparently covers only 'circumstantial severity', yet extends according to the ILC's commentary also to 'substantive severity'.

⁸³ In both kinds, obligations *erga omnes partes* and *erga omnes* generally or absolutely.

⁸⁴ An expression used by Sicilianos, *supra* note 53, at 1140.

⁸⁵ See Scobbie, *supra* note 80.

⁸⁶ See Schwelb, 'The Actio Popularis and International Law', 2 *Israel Yearbook of Human Rights* (1972) 46; Dupuy, 'Action publique et crime international de l'Etat', 25 *AFDI* (1979) 539.

from the viewpoint of the rights of the state objectively injured,⁸⁷ it is unclear what is left of either the special nature of responsibility for committing something akin to a ‘State crime’, or of the general incidence of peremptory norms on responsibility law.

C *The Partial Indeterminacy of the Rights of Affected States*

In the early 1980s, international practice had been marked by a series of initiatives of states that felt themselves affected by breaches of rules considered by them as essential to good order in international relations, even though none of them had suffered direct harm from these breaches. This was the case *inter alia* for European Community member states, for Canada, and less often the United States, in relation to the Soviets after their intervention in Afghanistan; to Argentina after its invasion of the Falklands in 1982; to Israel following its ill-named operation ‘Peace in Galilee’; to Poland following declaration of a state of emergency involving suspension of trade-union freedoms by General Jaruzelski,⁸⁸ and many others. At the time, Roberto Ago had just secured adoption of Article 30 of the first part of the draft, on the act giving rise to responsibility; this Article was then devoted, under the heading of ‘Circumstances precluding wrongfulness’, to defining ‘countermeasures’. He had first called these, in prey to the institutional mirage mentioned earlier, ‘sanctions’, thinking primarily of organized responses liable to be taken under the Security Council’s aegis.⁸⁹

Yet, at the time, the Berlin Wall was still standing, and the Security Council was habitually paralyzed by the veto when things got really serious⁹⁰ — which explains why the measures cited were not decided at the United Nations but elsewhere.

Between then and the opening of the twenty-first century the Berlin Wall fell, and with that, briefly illustrated for a while at least by the Gulf War and a few other matters, the United Nations was able to regain control of sanctions consequent not just on breaching the peace but even the ‘threat’ of it, interpreted in a sufficiently broad and evolutionary sense to cover decisions on humanitarian operations of considerable scope, the creation of ad hoc international criminal courts or assistance with the process of restoring democracy in certain countries. It was then possible to note that ‘sanctions’ taken individually or collectively by states feeling themselves affected by non-respect for international legality in certain of its fundamental

⁸⁷ Since its opening depends not on whether the primary obligation considered is peremptory, but only on whether it is *erga omnes*.

⁸⁸ For a detailed analysis of these initiatives and their legal consequences in relation to the ILC’s work in progress on responsibility law, see Dupuy, *supra* note 47, at 505; in a broader context, see Leben, *supra* note 47; Dominicé, ‘Observations sur les droits de l’Etat victime d’un fait internationalement illicite’, in *Droit international* 2 (1982); E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984); A. de Guttery, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale* (1985).

⁸⁹ The first version of his Article 30 as presented for the ILC’s attention read: ‘The wrongfulness of an act of State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.’ *ILC Yearbook* (1979) vol. II, Part Two, at 93. See also *ILC Yearbook* (1979) vol. I, at 171; and the commentary by Dupuy, *supra* note 47, at 526.

⁹⁰ I.e. for matters involving international peace and security in the context of a confrontation of interests between Western and Socialist countries.

principles concomitantly disappeared. Then the political conditions necessary for a unity of views by the permanent members of the Security Council partly broke down again, though without the practice of unilateral countermeasures to defend the law and the general interests of the international community necessarily assuming the same importance as in the past.

The ILC's work continued throughout this time. With regard to the possibility for states not subjectively injured to take countermeasures against the perpetrator, the 1996 draft, while recognizing that the notion of the 'injured State' extended to all states in the case of a crime,⁹¹ nonetheless remained equivocal as to whether one of the consequences of crime might be the right of states other than the one whose subjective rights were attacked to take countermeasures.⁹² By contrast, the interim draft of 2000 at least had the merit of clarity. Its Article 54(2) provided the possibility for states that it was unfortunately already calling⁹³ 'non-injured' to take countermeasures in response to 'severe breaches of essential obligations towards the international community' within the meaning of its Article 41.

However, with the text adopted in 2001, we come back to a fairly obscure position: Article 54 in its final version provides that non-injured states may only 'take lawful measures' against the perpetrator state 'to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached'. This ambiguous formula might at first sight lead one to think of the possibility of taking retaliatory measures, but that is a matter of course, since by contrast with countermeasures retaliatory measures are intrinsically lawful. Yet it is not clear whether there is a right for 'non-injured' states to take countermeasures, since these, though intrinsically unlawful, become lawful because they are a response to initial wrongfulness, in accordance with Article 22 of the same text. What is one to conclude?

Undoubtedly, as Denis Alland has not hesitated to do, one can say that 'the text on the international responsibility of states for wrongful acts recently adopted by the UN General Assembly contains neither the words "countermeasures of general interest" nor any synonymous expression, nor even an explicit allusion to any concept corresponding to it'.⁹⁴ By analyzing the traces left in the text and its commentary, especially on Article 54,⁹⁵ Alland concludes that the final text in fact does allow for the use of countermeasures.⁹⁶

The last stage of the codification ultimately retains, albeit cautiously and discreetly, the approach to the question of countermeasures first pursued by Roberto Ago. This

⁹¹ Article 30(3) of the 1996 draft.

⁹² See Sicilianos, *supra* note 53.

⁹³ Article 54 of the 2000 draft.

⁹⁴ See Alland, *supra* note 47, at 1221.

⁹⁵ Article 54 leaves open the question of whether any state whatever can take measures to secure performance of certain international obligations in the general interest, as opposed to its specific interests as an injured state. UN Doc. A/56/10, para. 55.

⁹⁶ See Alland, *supra* note 47.

presumably was because its realism impelled it not to overlook the possibility that states may in the future resume the practices, mentioned above, from the early 1980s.

We are thus finally left in the rather unsatisfactory position we were in 20 years ago with the *de facto* convergence of the concepts Ago had introduced into the text and the practice of Western states: the paradoxical combination of reprisals, inherited from the old international law of coexistence, with the defence of an international *ordre public* born from the normative affirmation of an ‘international community’, the first ferments of which can be found in the United Nations Charter. The combination is paradoxical because the former are placed at the service of the latter. Reprisals — which Denis Alland rightly recalls are an instrument *par excellence* of private justice — are (explicitly in the final version of the text) placed at the service of a peremptory law that, by contrast, expresses the primacy of common values over sovereign interests. This combination is by definition precarious, since it is unnatural: defence of the *ordre public* in principle presupposes the centralization of the evaluation of any infringements it suffers, and of the organization of the sanctions it merits; countermeasures by contrast are decentralized.⁹⁷ Their triggering depends only on an assessment by the state taking the countermeasure, not on a deliberation by the members of an organized, pre-constituted, pre-established community.

Here, if one takes a step back, one can see the breadth of the issues, but also the challenge the codifiers had to meet during their nearly 40 years of work, 40 years during which the structure of the international community itself changed, and the priorities of states considerably evolved.

Influenced by the historical circumstances in which the positive international law of responsibility had acquired certain of its features, the initial work of the ILC had confused the cause with its consequences, or the breach of obligations towards foreigners with the legal consequences given to it. Then, thanks to Ago’s designating responsibility as a body of secondary obligations consequent on all types of primary obligations, the ILC was able to restrict its thinking to the technical conditions of the relations between the originating act, its attribution and the content or implementation of responsibility. Could it then take refuge in reviewing well-established rules, restricting its course to one passing from the steamship *Wimbledon* to the Chorzow factories? In particular, could it have maintained this course, considering the comparative merits of *restitutio* and compensation, to ask how far coverage of *lucrum cessans* should be combined with compensation for *damnum emergens*? In short, could it have stuck to the classically bilateral approach of the relations established between perpetrator and victim, in the context of a responsibility that is certainly *international*, because of the nature of the subjects involved, but *civil* in object, being restricted to reparation?

The codifiers’ tranquillity was to be compromised from the outset by its immediate

⁹⁷ This is the case at least in general international law; certain conventional systems allow as an exception a delegation of the taking of countermeasures to a pre-constituted body. Examples include the WTO, which has an effective dispute settlement system that explicitly incorporates, at the Appellate Body stage, a review of legality.

antecedents. The ILC had already brought into its codification of the law of treaties the consideration of *ordre public* as a restriction on the absolute freedom of contract in the name of the interests of the 'international community of states as a whole'. After the adoption of the Vienna Convention, it little matters what the historical, substantive, tangible or political reality of the 'international community as a whole' is. Although one may still, according to one's viewpoint, discuss the density of its sociological reality, one can no longer question its legal reality. The latter has been established, if only thanks to the classical technique of the legal fiction, which spares one from proving its substantive reality. Thus the international community becomes the common reference point. This reference point can be found in treaties, in the case law of the International Court of Justice, in solemn declarations and in ordinary resolutions of the UN General Assembly. Continuing the communitarian logic of the United Nations Charter, this reference point is deployed in the international normative sphere with such breadth that the codifier of the law of responsibility can no longer ignore it.

By contrast with Denis Alland, I do not believe we can decide on the inadvisability of the notion of peremptory law in the context of the law of responsibility. It is true that, considered in purely formal terms, peremptoriness is designed to fit in with the system of non-derogability, a concept that applies to legal acts rather than to facts.⁹⁸

Yet the logic of *jus cogens* ought not to be perceived first of all from a formal viewpoint, but rather from a substantive one. As the successive rapporteurs, especially Ago and Crawford, have rightly said, as from the time when it was established (on the basis of, for example, the Vienna Convention and the Court's judgment in the *Barcelona Traction* case), this legal entity called the 'international community of states as a whole' allots substantive primacy to certain principles over others; one has then to seek to measure their incidence on the law of responsibility. In the conventional framework, nullity is one consequence arising from non-compliance with the peremptory; in the non-contractual context of responsibility, the differentiation or aggravation of that responsibility is another consequence.

It is here that homage has to be paid to Ago's audacity. He must be acknowledged to have had the courage to find that it was already too late to confine the law of responsibility to the area of reparations alone. Starting from a consideration of the originating act, he could not avoid, while refraining from incorporating it into the substantive analysis of the primary obligations, finding that these had henceforth to be put into two categories according to whether they were established between two subjects, or else concerned communities, among them one that by definition concerns *all* states, since it extends worldwide. It was appropriate to take this into account in the area of responsibility.

It was undoubtedly here that the project the ILC had embarked on was so dangerous. The law of responsibility highlights *par excellence* the epicentre of the confrontation between two conceptions of the unity of law seen as a legal order. One is relatively stabilized, characterized by reduction to the common denominator supplied

⁹⁸ See Alland, *supra* note 47.

by the primary subject of the order, and essentially concerns the modes of production, development, application and transformation of these norms. This is its formal unity. The other, still very much uncertain and contradictory, and constituted by the asserted (though not necessarily effective) primacy of certain values set up as legal rules, sets out a normative hierarchy founded no longer on the logic of attributability but of validity.⁹⁹ This is its substantive unity, which would like to take shape around a few key principles concerning the fundamental rights of states, and even more so the fundamental rights of the human person.¹⁰⁰ The first, formal unity, owes its coherence to the basic subjects of the international order, which remain the states. This is the one conceived first and foremost starting from the simple level of bilateral relations between two subjects declared to be legally equal; the second, material unity, is an ideal call for the emergence of a peremptory law of the world community.

The ILC met this confrontation. A body of experts, it had the remit of proposing rational solutions; it chose to design these solutions starting from an extension of the institutional integration for which Chapter VII of the Charter offers the blueprint. For a brief time, some began to hope that the experts' draft would fit with the intentions of the member states. But shortly afterwards the member states, and the last Special Rapporteur, became convinced that the advent of a universal communitarian law integrated into the United Nations was certainly not something that would happen any time soon. As Alexandre Sicilianos very lucidly puts it, the long shadow of the crime risked embarrassing the whole world. At the same time, the criminal aspect that Article 19 of the Ago draft intrinsically entailed had been partially moved aside. It can now be found as a foundation for the international responsibility of the individual, organized before special jurisdictions, whether *ad hoc* or permanent.

Right from Ago's first reports, and still more so from his Fifth Report that introduced the issues of the 'State crime', the codifiers had challenged the international community to find a means of safeguarding its interests. This challenge, which might look like a rational requirement, was to curb the sway of the rules of the relational law of coexistence in favour of the institutionalized organization of collective response as a consequence of breaches of peremptory rules. But the international community, for political rather than for technical reasons, proved incapable of meeting the challenge. In the confrontation between Hobbes and Kant, the former, though having suffered some noteworthy retreats, is definitely still ahead on points. Failing anything better, the possibility was left open, albeit by omission, of recourse to the crude technique of reprisals — emblematic if not of a state of nature, at least of the absence of the vertical integration of the international legal order — to seek to palliate the shortcomings of the institutionalized defence of *ordre public*. At any rate, faced with the inconstancy of

⁹⁹ See Combacau, 'Logique de la validité contre logique de l'opposabilité dans la convention de Vienne sur le droit des traités', in *Mélanges M. Virally* (1991) 195.

¹⁰⁰ On these two unities and their conflictual relations, see Dupuy, 'L'unité de l'ordre juridique international', *RCADI* (forthcoming in 2003).

sovereigns, the ILC managed to seize the chance to explore and systematize the legal conditions under which recourse to countermeasures was authorized.¹⁰¹

It was anyway time to close a building site that had been opened four decades earlier. The last two versions of the codification (the provisional text of 2000 and the final text of 2001) sought to consolidate the gains in the codification of the classical law inherited from the essentially bilateral reparatory responsibility, while conserving what they could of the dimension of '*communitarisme*'; as Andrea Gattini has finely analysed,¹⁰² they did so particularly by concentrating on the obligations of the various types of state affected, whether or not they be declared 'injured'.

It was a compromise text that the General Assembly approved at the end of 2001, and its prime merit is that it exists at all. Clarifying Anzilotti's legacy on many points, it leaves open the possibility for further development, the first outlines of which Ago had not hesitated to identify. Criticizing codification is often easy; but the art of codification requires a combination of expertise and diplomacy, and the members of the ILC were able to display enough of both to reach a text that is not an endpoint, but rather a step on the road to further development.

Who would dare to reproach scholars with not having been able to finish a design the accomplishment of which depended ultimately only on politicians?

¹⁰¹ In Articles 49–54 of the final text.

¹⁰² See Gattini, 'A Return Ticket to "*Communitarisme*". Please', 13 *EJIL* (2002) 1181.