THE CONTINUING DEBATE ON A UN CONVENTION ON STATE RESPONSIBILITY

At its 59th session in 2004, the General Assembly revisited the question of what should be done with the Articles on Responsibility of States for Internationally Wrongful Acts ('the Articles'), adopted by the International Law Commission ('ILC') in 2001. By Resolution 59/35, adopted by consensus on 2 December 2004 on the recommendation of the Sixth Committee,[1] the General Assembly once again resolved to defer further consideration and any decision on the final form of the Articles, postponing the matter to its 62nd session in 2007. It also asked the Secretariat to prepare a compendium of jurisprudence and State practice to assist the Assembly in its consideration of the topic at that time.

I. BACKGROUND TO THE DEBATE IN THE SIXTH COMMITTEE

At its 56th session in 2001, the Sixth Committee had considered what action to take in relation to the final Articles contained (together with the accompanying Commentaries) in the Report of the ILC on its 53rd session.[2]

The question was a controversial one even before the Articles were finally adopted on second reading in August 2001. Significant divisions existed within the ILC as to what course of action should be recommended to the General Assembly. Some members strongly supported the immediate convening of a diplomatic conference in order to conclude a convention based on the Articles. Others, including the Special Rapporteur, were of the view that the General Assembly should simply take note of the Articles, and that any decision as to the preparation of an international convention on the subject should be deferred for a period of years in order to allow States to become familiar with the Articles in practice. A compromise was reached: the ILC recommended to the General Assembly that it take note of the Articles and annex them to a resolution, deferring to a later stage the question whether an international conference should be convened with a view to concluding a convention on the topic.[3]

[1] General Assembly Resolution 59/35, 2 Dec 2000; UN Doc A/RES/59/35, adopted at the 65th plenary meeting of the General Assembly (see UN Doc A/59/SR.65). For the report of the Sixth Committee, see UN Doc A/59/505.

[2] For the Articles and Commentaries see *Report of the International Law Commission on the Work of its Fifty Third Session*, UN Doc A/56/10, Ch IV. The Articles and Commentaries are reproduced with an introduction and accompanying analytical apparatus in James Crawford *The ILC's Articles on State Responsibility; Introduction, Text and Commentaries* (CUP Cambridge 2002); versions have been produced in French (*Les articles de la C.D.I. sur la responsabilité de l'Etat; Introduction, texte et commentaires* (Pedone Paris 2003)) and Spanish (*Los artículos de la Comisión de Derecho Internacional sobre la responsabilidad internacional del Estado: introducción, texto y comentario* (Dykinson Madrid 2005)); a Chinese version is in press.

[3] *Report of the International Law Commision on the Work of its Fifty Third Session* (n 2), (§§72–3); for the record of the debate within the ILC, see UN Doc A/CN.4/SR.2709 (9 Aug 2001). See also J Crawford, J Peel, and S Olleson 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading' (2001) 12 EJIL 963, 969–70. The recommendation by the ILC followed the precedent set by the General Assembly in relation to the ILC's draft articles on the topic of nationality and State succession. The ILC had recom-

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The differences of opinion in the ILC as to the most appropriate final form for the outcome of its work on State responsibility were to a large extent mirrored in the Sixth Committee when the Articles were first discussed in 2001. There were 52 statements in the general debate of 2001, made by individual delegations or on behalf of groups of States (the Nordic group and the Southern African Development Community group), in all representing 68 governments.[4] The Articles were welcomed, and there was general (although not universal) support for the ILC's proposed two-stage approach to implementation. But on the ultimate form of the Articles there was a clear division of views: some governments thought that there was no prospect that the Articles could be transformed into a convention along the lines of the Vienna Convention on the Law of Treaties; the best course was not to adopt the Articles in any formal manner but to allow them to exert an influence on the crystallization of the law of State responsibility through application by international courts and tribunals and State practice. Others thought that a convention on State responsibility was both desirable and achievable. A few governments thought the matter should be immediately referred to a working group or even a diplomatic conference.

The views of the majority of delegations who spoke, however, were against any immediate move to a convention, and the Sixth Committee's draft resolution reflected this position. Adopted by the General Assembly by consensus, Resolution 56/83 of 12 December 2001 took note of the Articles, the text of which was annexed to the resolution, and 'commend[ed] them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action'.[5] By operative paragraph 4, the General Assembly decided to include the topic 'Responsibility of States for Internationally Wrongful Acts' in the provisional agenda for its 59th session in the autumn of 2004.

II. THE 2004 SIXTH COMMITTEE DEBATE

At the 59th session of the General Assembly in 2004, the consideration in the Sixth Committee of the topic of 'Responsibility of States for Internationally Wrongful Acts'

mended that the draft articles be adopted in the form of a declaration (see *Report of the International Law Commission on the Work of its Fifty First Session*; UN Doc A/54/10 and Corr 1 and 2) (1999) 14 at 44). Initially the General Assembly postponed any decision to the following session and invited comments from governments as to the possibility of the conclusion of a convention (General Assembly Resolution 54/112, 9 Dec 1999; UN Doc A/RES/54/112). Subsequently it took note of the draft articles, which were annexed to the resolution, invited governments to take the principles contained in the articles into account when dealing with questions of nationality of persons in the context of State succession, and decided to return to the question of their final form at its 59th session in 2004 (General Assembly Resolution 55/153, 12 Dec 2000; UN Doc A/RES/55/153). In 2004, the General Assembly again invited governments to take the principles contained in the draft articles into account, encouraged the elaboration of regional or sub-regional instruments addressing the question (an implicit reference to the Council of Europe's draft Protocol on the avoidance of statelessness in relation to State succession, currently under discussion), and again invited States to submit comments as to the advisability of conclusion of a legal instrument on the subject, and postponed further conclusion to its 63rd session in 2008 (General Assembly Resolution 59/34, 2 Dec 2000; UN Doc A/RES/59/34).

[4] For the summary records of the debates at the 56th session, see UN Docs A/C.6/56/SR.11–24, 27.

[5] General Assembly Resolution 56/83, 12 Dec 2001; UN Doc A/RES/56/83, §3.

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took place at the same time as consideration of the Report of the ILC on its 56th session.[6] Statements on the topic were made at the 15th and 16th meetings on 28 and 29 October 2004 by 28 representatives on behalf of, in all, 34 States.[7]

Given the previous divergence of views in 2001, it was to be expected that a number of States would press for the convening of a diplomatic conference when the subject returned to the Sixth Committee. In the event only a relatively small number of States adopted this position. The views expressed by delegations ranged across a broad spectrum but revealed essentially two opposing positions.

On the one hand, a number of speakers suggested that the only appropriate means by which to reflect the importance of the Articles was for them to be transformed into a convention. Some seem to have taken this position in order to provide a chance to reopen certain controversial issues, in particular the triad of countermeasures (Articles 49–54), invocation by States other than the injured State (Article 48), and the question of the 'aggravated' régime of responsibility for 'serious breaches' of obligations arising under peremptory norms of general international law (Articles 40–1). The Russian Federation, while emphasizing the balance of the Articles in reflecting basic principles, and their status with the Commentaries as 'a very valuable aid', nevertheless stated a number of concerns with particular provisions which, it suggested, could and should be adjusted during the preparation of an internationally binding instrument. To this end, it proposed that a working group should be established in order to consider the Articles. Cuba expressed concern as to the three controversial aspects of the Articles already mentioned, and emphasized the need for a convention to make provision for binding dispute settlement: it likewise proposed the creation of an ad hoc committee or working group. Belarus, although agreeing that the Articles were generally balanced, also suggested that certain aspects of the Articles would be open to reconsideration at a future diplomatic conference. It identified, again, the question of invocation by States other than the injured State and the notion of obligations *erga omnes* ('owed to the international community as a whole') more generally; these provisions should be better defined or even replaced with references to peremptory norms (*jus cogens*).[8] In addition the necessity of a binding dispute resolution mechanism in order to prevent abuses of countermeasures was emphasized.

On the other hand, a group of States expressed the view that the action of the General Assembly in 2001 in commending the Articles to the attention of governments was sufficient and that no further action was necessary or desirable. Notably this was the position taken by the United Kingdom and the United States of America. The United Kingdom emphasized the fragility of the compromises reached in the final text of the Articles, and warned against the reopening of old and fruitless debates which could lead to the unravelling of the text and a convention which would receive few rati-

[6] *Report of the ILC on the Work of its Fifty Sixth Session*; UN Doc A/59/10 (2004).

[7] For the summary records of the two meetings, see UN Doc A/C.6/59/SR.15 (The Netherlands, Brazil, Japan, China, the USA, Belarus, Israel, United Kingdom, Finland, Portugal, Greece, Slovakia, Australia, Austria, Spain, Uruguay, Venezuela, and Guatemala) and UN Doc A/C.6/59/SR.16 (Thailand, Cyprus, France, Jordan, Germany, Russian Federation, Switzerland, Mexico, Italy, and Cuba). Finland made a statement on behalf of itself and the other Nordic countries (Denmark, Iceland, Norway, and Sweden), while Australia made a statement on behalf of itself and Canada and New Zealand. The following summary is based on the texts of the statements made available by the delegations, and summaries of the statements by the other delegations, both on file with the authors.

[8] UN Doc A/C.6/59/SR.15 §63.

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fications. However, it recognized the call by some States for future consideration of the final form of the Articles, and proposed placing the topic on the agenda of the General Assembly for further consideration at the 63rd session in 2008. Finland also emphasized the risk that submitting the Articles to a diplomatic conference would entail, in particular the risk that the restatement of the law contained in the Articles would be 'eroded by compromises and package-deals that would be an evident part of a diplomatic conference aimed at producing a convention on the matter'. It too proposed that the topic should be placed on the agenda of the General Assembly in the future, but not before 2008. The United States of America strongly opposed any moves towards a diplomatic conference to adopt a convention, and emphasized the important influence that the Articles are already exerting in their present form as a guide for States and tribunals.

A variant on this position was taken by Australia (on behalf also of Canada and New Zealand) which opposed the adoption of a convention on the basis that it would be too risky, but which proposed that an appropriate status could be given to the Articles if they were adopted as a resolution by the General Assembly. A preference was expressed for such a resolution to be adopted at the current session as a matter of priority, thus disposing of the item so far as the General Assembly was concerned.

The representative of Thailand expressed the view that the careful balance in the text of the Articles would not benefit from a process of further negotiation of a text which was unlikely to be widely ratified. Guatemala, while expressing concerns in relation to the modalities of invocation by a State other than the injured State, preferred that the Articles be left to become a part of customary international law through their application by international courts and tribunals; this would be simpler than the conclusion of a convention, especially since the Articles were already moving in this direction. Whereas a convention on State responsibility would only bind States parties, if the Articles were left to mature into customary international law they would apply to all States. Italy felt that a convention would not be adequate to preserve the achievement of the ILC; international practice should be allowed to further contribute to the development of customary international law. Consistently with this view Italy proposed asking the Secretariat to collate international practice for the information of the Sixth Committee. The matter should not, in its view, return to the General Assembly before the 63rd session in 2008.

Thus some States favoured the convening of a conference or the adoption of measures preparatory to such a conference with the result, intended or not, of reopening the text. On the other hand, there was strong opposition to any steps in the direction of a conference and a preference for leaving the Articles in their present form. As between these contrasting positions, the lowest common denominator was one of 'wait and see'—although there were variations even on this theme, different views of how long to wait, different expectations of what would be seen at the end of waiting.

Cyprus stated that, given the time and effort which had gone into the preparation of the Articles, the only appropriate final form was a convention. It was not clear to what extent it expected that the Articles would be reopened at a diplomatic conference; on the one hand a conference would 'enable States to have full input into the eventual text'; on the other hand a working group within the Sixth Committee should only be asked to formulate a preamble and final clauses (including provisions on dispute settlement).

A number of States, while expressing the view that a convention was the only

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appropriate final form for the Articles given the importance of the topic, opposed any change to the substantive provisions. This was the case with Greece, which expressed the view that the adoption of the Articles as a convention, even if ratified by few States, would give them greater authority than they could have in their present form. Although criticising the predominance of the unilateral institution of countermeasures over any system of dispute settlement in the Articles, Greece opposed any change to the substance of the Articles and called for the constitution of a working group whose mandate was limited to three specific tasks: the drafting of a preamble, the drafting of the final provisions, and the drafting of a dispute settlement mechanism. Germany emphasized that in its view the Articles to a large extent reflected customary international law and had been widely applied by international courts and tribunals. In accordance with this position the Articles were likely over time to receive even wider recognition; pending such a development there was no need to rush to a convention. Accordingly, the question whether a convention should be concluded should be put off for a number of years. But in any event the eventual conclusion of a convention should not lead to a renegotiation of the substantive provisions of the Articles.

Similarly, Austria emphasized the importance of the Articles, drawing a parallel between them and the work of the ILC resulting in the Vienna Convention on the Law of Treaties 1969. If they were not adopted as a convention, some States might not feel obliged to comply with the conception of State responsibility embodied in the Articles, and this would be to the detriment of the stability and predictability of the law. But further work was needed, particularly on the question of dispute settlement, and accordingly a text could not be opened for signature immediately. In Austria's view, the question should come back to the General Assembly no later than at its 62nd session (in 2007); however, the Assembly should resist any attempt to make substantive changes to the text, which would jeopardize the careful balance achieved in the text.

Jordan was in favour of the conclusion of a convention; however, it was flexible as to the final state of the Articles, as in its view, they already reflected customary international law and constituted a restatement of international law on the topic of State responsibility, including on the controversial issue of countermeasures.

France was more ambivalent on the extent to which the Articles reflected customary international law. Given that the Articles went beyond merely codifying customary international law, a convention was the only realistic outcome; the Articles would constitute an excellent starting point for such work. It was however open to the possibility of a further delay to allow State practice to mature.

A number of delegations expressed support for a convention with particular emphasis on the addition of a dispute settlement mechanism, but did not press for this to happen at once. Brazil expressed the view that the only appropriate way to reflect the importance of the Articles was by way of a convention. Similar positions were taken by Venezuela and Uruguay. Spain emphasized the importance of the topic: in its view only a treaty would offer full legal security; it proposed that the General Assembly should reconsider the topic at its 62nd session in 2007 with a view to deciding whether to proceed to a diplomatic conference.

A sizeable group of delegations did not rule out the possibility of a convention in the future, but believed that further time was necessary for the Articles to become widely accepted. Thus Israel questioned the wisdom of adopting the Articles in a convention at least at the present stage: meanwhile it was necessary to test 'their

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resilience through the crucible of international theory and practice'. Switzerland thought it premature to move towards an international convention; more time should be allowed for the law to develop on the basis of the Articles. China too thought that conditions were not right for the convening of a diplomatic conference, but that the topic should be included annually or biennially in the agenda of the General Assembly; a working group should be set up to allow States 'to regularly exchange views on all relevant issues and on ways to solve those issues with a view to reaching an eventual decision on action to be taken when all conditions are right'. Slovakia, while not rejecting the possibility of a convention, expressed the view that any immediate move to convene an international conference would be premature, that more time was needed for States to become familiar with the Articles and for them to decide on the best approach to take. A period of three or four years was proposed. Similarly, the Netherlands expressed doubts as to the usefulness of a convention, stressing the great extent to which the Articles reflected customary international law and the important role they are playing in guiding State practice in those areas where they did not already reflect customary law. In its view, the General Assembly should return to the question no earlier than its 63rd session in 2008 in order to allow States to gain wider experience of applying the Articles in practice. Mexico (although not in principle opposed to a convention) also took the position that it was too early to take a decision on the final form of the Articles, and that the decision should be put off to a later session.

Japan expressed no view as to the most appropriate final form of the Articles, and merely argued that the General Assembly should return to the question in 4–5 years. It emphasized the extent to which the Articles had already been cited by international courts and tribunals.

Portugal emphasized the need for some action to be taken at the present session; as opposed to the immediate convening of a convention, it expressed the view that acceptable alternatives included the setting up of an ad hoc committee or requesting States for final comments on the subject, with a fixed deadline.

A draft resolution was introduced at the 25th meeting of the Sixth Committee on 9 November 2004 by Trinidad and Tobago.[9] This was adopted by the Sixth Committee without a vote on 17 November 2004,[10] and was subsequently adopted unchanged by the General Assembly as Resolution 59/35 on 2 December 2004.

Given the substantial number of States in favour of further postponement of the question (whether for a limited period, or permanently), no immediate decision on the question of convening a diplomatic conference for the purposes of concluding a convention could be taken. Resolution 59/35, in addition to commending the Articles once more to the attention of States, again 'without prejudice to the question of their future adoption or other appropriate action',[11] postponed further consideration of the final form of the Articles in the General Assembly until the 62nd session in 2007.[12]

At the same time the Secretary-General was asked to seek written comments from governments on any future action in relation to the Articles, to prepare 'an initial compilation of decisions of international courts, tribunals and other bodies referring to

[9] For the draft resolution, see UN Doc A/C.6/59/L.22; see also UN Doc A/C.6/59/SR.25 for the introduction of the draft.

[10] See UN Doc A/C.6/59/SR.26 and the report of the Sixth Committee to the General Assembly on the topic: UN Doc A/59/505 (22 Nov 2004).

[11] Resolution 59/35 (n 1) §1.

[12] ibid §4.

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the articles' and to invite governments to submit information on their practice in relation to the Articles.[13] In introducing the draft resolution in the Sixth Committee, the representative of Trinidad and Tobago, Ms Ramoutar, emphasized that it was not intended that in so doing 'the Secretary-General should make any attempt to interpret the articles or any decision relating to them'.[14] The Resolution further requested that the material thus collected be made available well in advance of the Sixth Committee's consideration of the topic in the autumn of 2007.

III. REFLECTIONS ON THE DEBATE

As a matter of impression the number of delegations supporting the eventual elaboration of a convention or at least prepared to keep that option open has increased between 2001 and 2004, although it is difficult to be certain given that not all States which made statements in 2001 did so in 2004 (and vice versa). Whether or not the number of States supporting a convention has increased, there now appears to be only a small number supporting the reopening of the compromises contained in the ILC's text or favouring general revision of the Articles. Several States (eg Mexico, Guatemala) which might have been interpreted as taking that position in 2001 appear to have shifted towards support for the Articles as a whole.

An interesting aspect of the debate was the lack of a common position adopted by the Members of the European Union. Although all more or less supportive of the Articles, they varied between being staunchly in favour of a convention (Spain, France), opposed to a convention at least for the foreseeable future (United Kingdom, Italy, the Nordic countries) or in favour of some intermediate position (Germany, Austria, the Netherlands, Slovakia). They were also divided on the extent to which the Articles reflect existing customary international law.

One may ask whether a preparatory working group, for which a number of delegates called, would not tend to reopen the substance of the Articles. Even though most such calls were accompanied by assurances that no fundamental modification of the Articles was envisaged, the consequence of resubmitting the Articles to a generalized debate may be the collapse of the delicate compromises achieved during the second reading process. It was no doubt because of such concerns that some delegations (eg Greece and perhaps Cyprus) proposed that the mandate of any working group be limited to drafting a preamble, final sections, and possibly a dispute settlement mechanism.

On the other hand, there is a sizeable group of States which, although supporting or remaining open to the idea of an international diplomatic conference, express the clear view that the Articles as they stand should not be modified. For these States, as well as for those which oppose any form of diplomatic conference, the Articles are for the most part a reasonable working summary of the international law of responsibility. Although certain areas of controversy remain (in particular, third-party countermeasures, the regime of serious breaches and invocation by States other than the injured State), it seems fair to infer that for this group of delegations the balance of the Articles as a whole is acceptable.

Given the division of views between States, the request for a study by the Secretariat of practice and judicial decisions relying on the Articles may serve several

[13] ibid §§2 and 3.
[14] See UN Doc: A/C.6/59/SR.25, § 59.

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purposes. On the one hand, for those States in favour of the conclusion of a convention, this may be seen as a concrete sign that some action is being taken to that end. For those States opposed to the conclusion of any instrument, the study may reveal the extent to which the Articles are being relied upon in practice by international courts and tribunals, as well as by States themselves, and could provide support for the argument that no further action is necessary

The value of the Secretariat study will be limited to a degree in that there is to be no question of the Secretariat interpreting the Articles themselves or the decisions relying on them. It appears that the study will simply be a collection of decisions referring to the Articles. Although there are a large number of cases which have made reference to various provisions of the Articles, others may be interpreted as supporting some of the choices made by the ILC, particularly in relation to the more controversial issues.

In any event it is clear that litigants are increasingly relying on the Articles and commentaries, and that international courts and tribunals are treating them as a source on questions of State responsibility. This had been the case with the Draft Articles as adopted on first reading, which were referred to on a number of occasions by the International Court of Justice[15] as well as other courts and tribunals.[16] Since 2001 the number of such references has increased, extending in a few cases to domestic courts.[17]

In its Advisory Opinion on *The Wall,* the International Court referred to the Articles in the context of its discussion of necessity.[18] In addition, although without specific mention of the Articles, the Court apparently drew on the regime of potential consequences for third States deriving from 'serious breaches' codified in Articles 40 and 41 (the obligation of non-recognition, the prohibition of aid and assistance, and the obligation of

[15] See, eg, *Gab_íkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7 at 38, 39–41, 46, 54, 55–6 (§§47, 50–3, 58, 79, and 83); '*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*' [1999] ICJ Rep 62 at 87 (§62); see also, eg, the dissenting opinions of Judge Schwebel in Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), '*Jurisdiction and Admissibility*' [1984] ICJ Rep 392 at 607–8 (§74); and '*Merits*' [1986] ICJ Rep 14 at 377–8 (§§232–3); and the Separate Opinion of Judge Shahabuddeen in Certain Phosphate Lands in Nauru (*Nauru v. Australia*) '*Preliminary Objections*' [1992] ICJ Rep 240 at 283–4.

[16] See, eg, the Arbitral Tribunal in *Rainbow Warrior (New Zealand/France), RIAA*, vol XX, 217 (1990); the International Tribunal for the Law of the Sea in *The M/V 'Saiga' (No2) (Saint Vincent and the Grenadines v Guinea)*, (1999) 38 International Legal Materials 1323, at 1345, 1351–2 and 1357 (§§98, 133, and 171) and the brief reference of the Panel in *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States,* WT/DS27/R/USA, report of 22 May 1997, n 361. See also the Panel Report in *Turkey—Restrictions on Imports of Textile and Clothing Products*, report of 31 May 1999, WT/DS34/R, §§9.42–9.43.

[17] See, eg, the discussion of Art 4 in the decision of the United States Court of Appeals for the Second Circuit, in *Compagnie Noga D'Importation et D'Exportation, SA v Russian Federation,* 361 F.3d 676 (2004) at 689.

[18] '*Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*' [2004] ICJ Rep 136 at 194–5 (§140); see also the '*Declaration of Judge Buergenthal*' [2004] ICJ Rep at 241 (§4), referring to the formulation of the right of self-defence as a circumstance precluding wrongfulness in Art 22 of the Articles. Judge Simma had already referred to the Articles in his Separate Opinion in *Oil Platforms (United States of America v Iran)* on the questions of countermeasures and plurality of responsible States: [2004] ICJ Rep 161 at 332 (§12, footnote 19), and 358–9 (§§75–8). In relation to the latter point, Judge Simma referred to the Articles as constituting an 'authoritative source' of the law (ibid at 358, (§75)).

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cooperation),[19] although maintaining its existing practice of referring to obligations *erga omnes* rather than to peremptory norms.[20]

The Articles and commentaries have continued to be widely cited by other international bodies, including the Arbitral Panels and the Appellate Body operating under the dispute settlement mechanism of the WTO,[21] the European Court of Human Rights,[22] ICSID and other tribunals dealing with investment disputes,[23] and other international

[19] *Legal Consequences* (n 18) at 199–200 (§§154–60), in particular at 200 (§§ 159 and 160). cf the Separate Opinion of Judge Kooijmans, dissenting on this point, discussing Art 41 of the Articles: ibid at 230–2 (§§37–45).

[20] The Court emphasized the *erga omnes* nature of the right to self-determination and certain rules of humanitarian law (ibid at 199–200 (§§156–8)); it then observed that '[g]iven the character and the importance of the rights and obligations involved', certain consequences were involved for other States (ibid, at 200 (§159). Although the most natural reading of the Court's judgment is that it is the *erga omnes* nature of the rights and obligations which produce these consequences, given that the rights in question also undoubtedly form part of *jus cogens*, it is possible that the Court was referring (in an extremely elliptical manner) to the peremptory character of the norms. For criticism of the Court's approach on this point, and in particularly its apparent reliance on the *erga omnes* character of the norms in question, see the Separate Opinion of Judge Higgins, ibid at 216–17 (§§37–9).

[21] See, eg, the decisions of the Appellate Body in *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, report of 8 Oct 2001, WT/DS192/AB/R, §120 and *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe From Korea*, report of 15 Feb 2002, WT/DS202/AB/R, §259 (Art 51 (proportionality of countermeasures)); the decision of the arbitrator in *United States—Tax Treatment For 'Foreign Sales Corporations'*, WT/DS108/ARB, decision of 30 Aug 2002, §5.26 (Art 51, proportionality) and §5.58–5.60 (Art 49(1); object and purpose of countermeasures); and the Report of the Panel in *Measures Affecting The Cross-Border Supply Of Gambling And Betting Services*, WT/DS285/R, report of 10 Nov 2004, §§6.128–6.129 (Art 4; attribution of organs of the State; 7–9.130). See also recently *European Communities—Measures Affecting Trade In Commercial Vessels*, report of 22 Apr 2005, WT/DS301/R, where the Articles were relied on heavily in argument by parties.

[22] See, eg, *Ila_cu and Others v Moldova and Russia (Merits and Just Satisfaction)* Application No 48787/99, judgment of the Grand Chamber of 8 July 2004, § 319 (ultra vires acts) and §§320–1 (continuing wrongful acts) (available at <http://www.echr.coe.int>).

[23] See, eg, the award of the tribunal in *Mondev International Ltd v United States of America*, ICSID Case No. ARB(AF)/99/2, award of 11 Oct 2002, ICSID Reports, vol 6, 192, at 208, 222 (§§68, 115); the decision on annulment of the ad hoc committee in *Compañiá de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic,* ICSID Case No ARB/97/3, decision of 3 July 2002, ICSID Reports, vol 6, 340 at 346, 366 (§§16 (footnote 17), 95, 97); and the awards of the tribunals in *ADF Group Inc v United States of America,* ICSID Case No ARB(AF)/00/1, Award of 9 Jan 2003, ICSID Reports, vol 6, 470, at 522, 533 (§§166, 190); *The Loewen Group Inc. and Raymond L Loewen v United States of America,* ICSID Case No ARB(AF)/98/3, Award of 26 June 2003, ICSID Reports, vol 7, 442, at 470–1 (§149); *CMS Gas Transmission Company v Republic of Argentina,* ICSID Case No ARB/01/8, Decision on Objections to Jurisdiction of 17 July 2003, ICSID Reports, vol 7, 492 at 517 (§108); *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on Objections to Jurisdiction of 29 Jan 2004, ICSID Reports, vol 8, 518 at 552 (§122); *Tokios Tokeles v Ukraine,* ICSID Case No. ARB/02/18, Decision on Jurisdiction of 29 Apr 2004, §102 (available at <http://www.investmentclaims.com/decisions/Tokios-Ukraine-Jurisdiction-29Apr2004.pdf>) *Impregilo SpA v Islamic Republic of Pakistan* (ICSID Case No ARB/03/3) Decision on Jurisdiction of 22 Apr 2005, §§312–313 (available at <http://www.investmentclaims.com/decisions/Impregilo-Pakistan-Jurisdiction-22Apr2005.pdf>; *Eureko BV v Republic of Poland*, Partial Award of 19 Aug 2005, §§128, 130–132, 187–188 (available at <http://www.investmentcaims.com/decisions/Eureko-Poland-LiabilityAward.pdf>); and the Award of 12 May 2005 in the *CMS v Argentina* case (available at <http://www.investmentclaims.com/decisions/CMS-Argentina-FinalAward-12May 2005.pdf>), referring extensively to Arts 25 and 27 in relation to necessity as a circumstance precluding wrongfulness, and Arts 34–6 of the Articles in relation to reparation.

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tribunals.[24] Further, it may be that certain aspects of the Human Rights Committee's General Comment No 31, adopted on 29 March 2004 were drafted with the Articles and Commentaries in mind.[25]

Thus there is an ongoing process of consolidation of the international rules of State responsibility as reflected in the Articles. In many cases (eg attribution, continuing wrongful acts, the components of reparation) the Articles have been generally taken to reflect customary international law. But references, direct or indirect, have also been made to other more controversial provisions, including Articles 40, 46, and 51.

One ground given by a number of delegations favouring a convention incorporating the Articles concerned the need for a dispute-resolution mechanism. But there is a dilemma here. It is of course fundamental to the strategy underlying the Articles that they do not seek to articulate the so-called primary or substantive obligations of States, but form a framework for the application of these obligations, whatever they may be. This point is made in the very first paragraph of the commentaries:

> The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive international law, customary and conventional.[26]

This being so, a dispute over some issue of responsibility will rarely be limited to a question concerning the Articles as such; it will extend to the substantive obligation breach of which is said to give rise to responsibility. It is true that in the *LaGrand* case, the United States accepted that there had been a breach of Article 36 of the Vienna Convention on Consular Relations,[27] and the questions for the Court rather concerned the remedial consequences of that breach (as well as the question of liability for breach of the provisional measures earlier indicated by the Court). But even then, it was still necessary for the Court to interpret and apply the Convention (which, in conjunction with the Optional Protocol, was the source of its jurisdiction over the dispute).[28] As the

[24] See, eg, Permanent Court of Arbitration; *Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom)* Final Award, 2 July 2003 (2003) 42 International Legal Materials 1118, at 1144 (§145).

[25] Human Rights Committee, *General Comment No 31, General Comment on Art 2; The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, 29 Mar 2004. See, eg, §2: 'While article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. […] the Committee commends to States Parties the view that violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.'

[26] See, eg, *Report of the ILC on the Work of its 53rd Session* (n 1) at 59; Crawford *The ILC's Articles* (n 1) at 74.

[27] *LaGrand (Germany v United States of America),* ICJ Reports 2001, 466, at 481 (§39); the acceptance was limited to the injury to Germany as such, and did not extend to the claims of violation of the individual rights of the LaGrand brothers, in relation to which a jurisdictional objection was taken.

[28] ibid at 480–3 (§§37–42), in relation to the question of whether the Convention granted rights to individuals.

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Permanent Court stressed in the *Chorzów Factory* case, jurisdiction in respect of an internationally wrongful act extends to consequential issues of State responsibility, including the form and extent of reparation.[29] But the question must be asked whether the converse is not also true, that is, whether jurisdiction over a dispute concerning the interpretation or application of the Articles on Responsibility of States for Internationally Wrongful Acts (assuming some version of those Articles were to be turned into a convention) would not entail jurisdiction over the primary obligation breach of which is said to give rise to responsibility.

Evidently the answer will depend on the terms of any dispute settlement clause to be included in the Convention. But there is a dilemma here for States. Either the clause is formulated in broad terms or an attempt is made to limit its focus to specific issues arising under the Convention on State Responsibility as such. In the former case, the jurisdiction will extend to any claim that the respondent State has violated an international obligation and that the applicant State is entitled to invoke its responsibility therefor. Such a jurisdiction is virtually coextensive with that referred to in Article 36(2) of the Statute of the International Court.[30] Of course not all international disputes concern responsibility—land or maritime boundary disputes, for example, need not do so. But even in the case of a boundary dispute it is common for there to be ancillary claims of violation of the boundary—as for example in the *Aegean Sea*[31] and *Cameroon/Nigeria*[32] cases. The same is true as concerns disputes over the extent of a State's jurisdiction to prescribe or enforce—*The Lotus*, for example,[33] or the various

[29] *Factory at Chorzów, Jurisdiction, 1927, PCIJ, Series A, No 9*, at 21: 'It is a principle of international law that breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity that this be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.'

[30] See Crawford, Peel, and Olleson 'The ILC's Articles …' (n 3) at pp. 967-968. For more detailed discussion in relation to the dispute resolution provisions included in the draft Articles adopted in 1996 on first reading, see ibid at pp 966-969.

[31] *Aegean Sea Continental Shelf*, ICJ Reports 1978, 3; see in particular the request made in Greece's Application (quoted at 6–7 (§ 12)) that the Court declare that '(v) that the activities of Turkey […] constitute infringements of the sovereign and exclusive rights of Greece to explore and exploit its continental shelf or to authorize scientific research respecting the continental shelf'.

[32] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equitorial Guinea intervening)* [2002] ICJ Rep 303; the Court disposed of the claims and counter claims of violations of the border somewhat summarily. It dismissed Cameroon's claim for a declaration that Nigeria was obliged to withdraw troops from the Bakassi peninsula and the area near Lake Chad awarded to Cameroon, and for guarantees of non-repetition in that regard on the basis that having delimited the boundary it could not 'envisage a situation where either Party […]would fail to respect the territorial sovereignty' of the other Party (ibid at 452 (§318)); the Court continued that moreover 'In the circumstances of the case […] by the very fact of the present Judgment and of the evacuation of the Cameroonian territory occupied by Nigeria, the injury suffered by Cameroon by reason of the occupation of its territory will in all events have been sufficiently addressed. The Court will not therefore seek to ascertain whether and to what extent Nigeria's responsibility to Cameroon has been engaged as a result of that occupation' (ibid, at 452 (§319)). The Court further held that Cameroon had failed to prove its allegations as to breach by Nigeria of the Provisional Measures (ibid, at 453 (§322)), and further held that neither party had established the facts supporting their claims in relation to border incidents or had proved that those acts were imputable to the other party (ibid, at 453 (§324)).

[33] *The 'Lotus'*, 1927 PCIJ Series A No 10; it was expressly contemplated in the *compromis* submitting the case to the Permanent Court that if the Turkish exercise of jurisdiction over

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Fisheries Jurisdiction[34] or *Arrest Warrant*[35] cases. Virtually any dispute concerning the rights and obligations of States can be presented as one concerning State responsibility, even if a merely declaratory remedy is sought. And if there is any doubt about the matter it can always be resolved in favour of jurisdiction by one State taking action to enforce its contested rights, for example, by infringing the contested boundary, exercising the contested jurisdiction or taking countermeasures in response to the conduct of the other State. No doubt the dispute will be aggravated thereby—but it will incontestably become a dispute concerning State responsibility, whatever the underlying cause may be.

Thus either the dispute settlement clause will confer a very broad jurisdiction over claims of breaches of international obligations, or it will be artificially confined to secondary questions with the consequence that the court or tribunal will be disabled from completely addressing the dispute. To be useful in practice, dispute settlement in State responsibility cases needs to be broad—yet it is very doubtful whether States are ready to accept such a broad jurisdiction, unlimited as to the subject matter of the primary obligation.

It is true that many States have accepted compulsory jurisdiction in relation to given classes of dispute, for example under the Law of the Sea Convention and the covered agreements of the World Trade Organization. But it is one thing to accept jurisdiction over a specified class of primary obligations in some given field and another thing to accept a general jurisdiction under treaties and customary international law. The latter would amount to a further version of jurisdiction under Article 36(2) of the Statute, acceptable perhaps to States which already accept the Optional Clause (but why should they do so twice?), unlikely to be acceptable to those which do not. And this analysis leaves to one side questions of the relationship between existing jurisdictions which

Lieutenant Demons was found to be contrary to international law, the Permanent Court should then go on to consider the question of whether pecuniary reparation was payable in those circumstances, and if so, in what amount (ibid at 5).

[34] *Fisheries Jurisdiction (Spain v Canada), Jurisdiction of the Court* [1998] ICJ Rep 432; see in particular the declaration sought in the Spanish Application (quoted ibid at 437 (§10)) that Canada was bound to refrain from the exercise of jurisdiction outside its exclusive economic zone, and was bound to offer reparation in the form of 'an indemnity the amount of which must cover all injuries and damages occasioned', and that the boarding of the *Estai* breached international law. See also *Fisheries Jurisdiction (Federal Republic of Germany v United Kindom), Merits* [1974] ICJ Rep 3; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland), Merits* [1974] ICJ Rep 175; the UK in its Memorial on the Merits had requested (quoted ibid at 7 (§11)), a declaration that Iceland's activities in interfering with fishing vessel were unlawful and that 'Iceland is under an obligation to make compensation therefor to the United Kingdom (the form and amount of such compensation to be assessed, failing agreement between the Parties, in such manner as the Court may indicate)'; similarly, Germany had requested a similar declaration that Iceland's acts were unlawful, and 'that Iceland is under an obligation to make compensation therefor to the Federal Republic of Germany' (ibid at 179 (§12)). The UK settled that part of its claim prior to the hearing on the merits and accordingly withdrew it (ibid at 7 (§12)), while the Court refused to accede to Germany's claim on the basis that there was no concrete claim for damage suffered supported by detailed evidence, and Germany had not requested the Court to assess the quantum in a separate phase of the proceedings (ibid at 204–5 (§76)).

[35] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3. Note the request in the DRC's Memorial and oral submissions (quoted ibid at 8–9 (§12)) for a declaration that 'a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC'.

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encompass issues of responsibility—whether for breaches of human rights or investment protection or world trade or law of the sea obligations—and the regime of dispute settlement under a general convention on state responsibility.

On balance, the better course of action remains that adopted by the General Assembly in 2001 and again in 2004 in putting off any decision on the final form of the Articles until a later date.[36] At present the Articles are performing a constructive role in articulating the secondary rules of responsibility. It may seem paradoxical that this role can only be preserved by keeping the possibility of a convention open while perpetually postponing a decision on the conclusion of such a convention. But given the alternatives and the danger of the Sixth Committee's replicating the ILC's 40 years of work on the subject, perhaps to lesser effect, this seems to be the only way forward. In the meantime, it may be expected that the position of the Articles as part of the fabric of general international law will be further consolidated and refined through their application by international courts and tribunals.

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[36] cf the view of Shabtai Rosenne 'State Responsibility—*Festina Lente*' (2004) 75 British Yearbook of International Law 363, at 371 'Resolution 56/83 gives the draft articles on the responsibility of States for internationally wrongful acts a firmer standing than they would have had had they not been so annexed, and this standing is increased by Resolution 59/35. The General Assembly in fact is inviting law applying organs, and that includes individual States attempting to resolve a dispute in which issues of State responsibility are relevant, to look to the draft articles as a statement of the law on the matter. Time will tell how effective this new method of codifying a difficult branch of the law will be.'

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