CAMBRIDGE

Cambridge University Press
0521813530 - The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries
James Crawford
Excerpt
More information

INTRODUCTION

James Crawford

1. History of the State responsibility topic in the I.L.C.

In 1948 the United Nations General Assembly established the International Law Commission, as a step towards fulfilling the Charter mandate of "encouraging the progressive development of international law and its codification".[1] The I.L.C.'s initial step was to draw up a work program, based on a review of the field by Hersch Lauterpacht.[2] The subject of State responsibility was one of the fourteen topics selected.[3] This was not surprising, first in that it is a major chapter of international law, second in that it had already been selected for codification under the League of Nations, being a principal subject of the unsuccessful conference of 1930.[4] Already by 1949 it was unfinished business.

Work began in 1956 under F.V. García Amador (Cuba) as Special Rapporteur. It focused on State responsibility for injuries to aliens and their property, that is to say on the substantive rules of the international law of diplomatic protection. Although García Amador submitted six reports between 1956 and 1961, the I.L.C. barely discussed them. In part this was because of the demands of other topics (arbitral procedure, diplomatic and consular relations, the law of treaties). But that was not the main reason. The divisiveness of the general debate held in 1957 suggested that there was no agreement as to the way forward. Some sought to limit the topic to diplomatic protection; others thought the rules of diplomatic protection outmoded.[5] An initial decision was made to limit the topic to "civil" responsibility — not surprisingly since the focus was to be on injuries

1 U.N. Charter, Art. 13 (a); G.A. Res. 174 (II) of 21 November 1947. For the I.L.C.'s review of its work methods after fifty years see *I.L.C. Report . . . 1996*, A/51/10, ch. VII, paras. 150-244. The I.L.C's output during this period is conveniently set out in A.D. Watts, *The International Law Commission, 1949-1998* (Oxford, Oxford University Press, 1999), 3 vols. Generally on the work of the I.L.C., see H.W. Briggs, *The International Law Commission* (Ithaca, N.Y., Cornell University Press, 1965), pp. 129-141; S. Rosenne, *Practice and Methods of the International Law Commission* (New York, Oceana, 1984), pp. 73-74; I. Sinclair, *The International Law Commission* (Cambridge, Grotius, 1987), pp. 46-47, 120-126; R. Ago, "Nouvelles reflexions sur la codification du droit international" (1988) 94 *R.G.D.I.P.* 539.

2 Reprinted in E. Lauterpacht (ed.), *The Collected Papers of Sir Hersch Lauterpacht* (Cambridge, Cambridge University Press, 1970), vol. I, p. 445.

3 *Yearbook . . . 1949*, p. 281.

4 See S. Rosenne, *League of Nations Committee of Experts for the Progressive Codification of International Law (1925-1928)* (New York, Oceana, 1972), and *League of Nations Conference for the Codification of International Law (1930)* (New York, Oceana, 1975). For the *Bases of Discussion* submitted to the 1930 Conference see *Yearbook . . . 1956*, vol. II, pp. 223-225.

5 See *Yearbook . . . 1957*, vol. I, pp. 154-172, for the range of views.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521813530 - The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries
James Crawford
Excerpt
More information

to aliens.[6] But García Amador was criticized by others, including Roberto Ago, for leaving out important issues including reprisals, which were characterized as "penal".[7] The disagreements were such that little progress was likely to be made, and in 1957 the I.L.C. by majority postponed any detailed discussion of García Amador's proposals.[8] In fact they were never discussed individually.[9]

Thus no progress had been made when García Amador departed in 1961. In 1962, an inter-sessional subcommittee chaired by Roberto Ago (Italy) recommended that the I.L.C. should redraw the boundaries of the topic so as to focus on "the definition of the general rules governing the international responsibility of the State".[10] By this was meant the rules of general application concerning State responsibility, applicable not only to diplomatic protection but also to other fields (human rights, disarmament, environmental protection, the law of the sea . . .). By inference, the point was not to elaborate the substantive rules themselves or the specific obligations of States arising from them. These would differ from treaty to treaty and from State to State. Rather the focus was to be on the framework or matrix of rules of responsibility, identifying whether there has been a breach by a State and what were its consequences. The subcommittee added that

> "there would be no question of neglecting the experience and material gathered in special sectors, specially that of responsibility for injuries to the person or property of aliens; and . . . that careful attention should be paid to the possible repercussions which new developments in international law may have had on responsibility".[11]

The topic was thus seen as involving some combination of the as-yet-uncodified old and the still unspecified new.

In 1963, the I.L.C. approved this reconceptualization of the topic and appointed Ago as Special Rapporteur. Between 1969 and 1980, he produced eight reports, together with a substantial addendum to the eighth report, submitted after his election to the International Court.[12] During that time, the I.L.C. provisionally adopted thirty-five articles, together making up Part One of the proposed Draft Articles ("Origin of State responsibility"). Part One was, overall, coherent and comprehensive; it was accompanied by lengthy, scholarly, rather argumentative commentaries.[13] In

6 *Yearbook . . . 1956*, vol. I, p. 246 (García Amador's summary of the debate).
7 *Yearbook . . . 1957*, vol. I, p. 169 (García Amador), and see ibid., p. 170 (Ago's reply, which seemed to equate the penal consequences for the responsible State to the taking of countermeasures or reprisals).
8 *Yearbook . . . 1957*, vol. I, p. 181.
9 In their final form they can be found in *Yearbook . . . 1961*, vol. II, pp. 46-54. See also F.V. García Amador, L. Sohn & R.R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Dobbs Ferry, N.Y., Oceana, 1974); R.B. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* (Charlottesville, University Press of Virginia, 1983).
10 *Yearbook . . . 1963*, vol. II (Part One), doc. A/CN.4/152, p. 228, para. 5.
11 Ibid.
12 For a list of the reports of the five Special Rappoteurs, see Appendix 1C, below, p. 347.
13 The commentaries to Part I are scattered through the *Yearbooks* for the years 1973-1980, but are conveniently set out in S. Rosenne (ed.), *The International Law Commission's Draft Articles on State Responsibility Articles 1-35* (Dordrecht, Nijhoff, 1991).

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521813530 - The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries
James Crawford
Excerpt
More information

particular, its detailed treatment of the rules of attribution and the general justifications or excuses for an internationally wrongful act (under the title "Circumstances precluding wrongfulness") was influential. It was frequently referred to by scholars and cited by courts. It set a standard for the project. But at the same time it left it truncated and incomplete. Moreover, Ago left few clues as to how the text as a whole should be completed. His structure for the five Chapters of Part One has proved definitive, but there was no similar structure for the remaining part or parts. Evidently these would concern reparation; he made it clear they should also include countermeasures. The consequences of "international crimes of State", a concept introduced in article [19], would be spelled out.[14] But these were little more than vague hints, not formed proposals.

In 1979, Willem Riphagen (Netherlands) was appointed Special Rapporteur. Between 1980 and 1986, he presented seven reports, containing a complete set of Draft Articles on Part Two ("Content, forms and degrees of international responsibility") and Part Three ("Settlement of disputes") together with commentaries. Owing to the priority given to other topics, however, only five articles from his Part Two were provisionally adopted during this period. By far the most important of these was what became article [40], an extended definition of "injured State".[15]

In 1987, Riphagen not having been reelected to the I.L.C., Gaetano Arangio-Ruiz (Italy) was appointed in his place. In the period 1988-1995, he presented seven reports. The Drafting Committee dealt with the remainder of Parts Two and Three in the quinquennium 1992-1996, enabling the I.L.C. to adopt the text with commentaries on first reading in 1996. The Draft Articles of 1996 thus consisted of three tranches, Part One (articles [1]–[35], adopted in the period 1971 to 1980 under Ago), a few articles in Part Two, Chapter I adopted in the period to 1986 under Riphagen, and the residue dealing with reparation, countermeasures, the consequences of "international crimes" and dispute settlement, adopted in the period 1992-1996 under Arangio-Ruiz.[16]

During these years no attempt was made to reconsider any issues raised by Part One except article [19]. Even then, once it had been decided to retain the concept of international crimes, the actual language was left undisturbed; only the addition of a footnote revealed the fundamental lack of consensus.[17] Nor for that matter were Riphagen's five articles in Part Two reconsidered, in particular article [40]. The two longest and least satisfactory of the articles were thus left virtually unexamined in

14 To avoid confusion, references to Draft Articles adopted on first reading will be in square brackets (e.g., article [19]). For the text of the Draft Articles adopted on first reading, see Appendix 2, below, p. 348. For a table of equivalents as between first and second reading see Appendix 3, below, p. 366.

15 For the text of art. [40] see below, p. 357.

16 For a table showing the evolution of the first reading text see Appendix 1A, below, p. 315.

17 Added to art. [40] (3) in 1996, this said:

> "The term 'crime' is used for consistency with article 19 of part one of the articles. It was, however, noted that alternative phrases such as 'an international wrongful act of a serious nature' or 'an exceptionally serious wrongful act' could be substituted for the term 'crime', thus, *inter alia*, avoiding the penal implication of the term."

Yearbook . . . 1996, vol. II (Part Two), p. 63.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521813530 - The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries
James Crawford
Excerpt
More information

1996. Instead, following disagreements within the I.L.C. on a number of questions — in particular, the relations between State responsibility and the powers of the Security Council — Arangio-Ruiz resigned as Special Rapporteur.[18] Not having been renominated by Italy, he ceased to be a member of the I.L.C. the same year. For these and other reasons, the coordination of articles in the different Parts, rather obviously lacking, was left to the second reading.

2. The *acquis* of 1996 and the key problems

At its forty-ninth session in 1997, the I.L.C. adopted a provisional timetable with the aim of completing the second reading by the end of the quinquennium, i.e. by 2001. Three major unresolved issues were tentatively identified as requiring special consideration: international crimes (article [19]), the regime of countermeasures and the settlement of disputes.[19] This was an obvious enough list, but as events were to prove it included only some among many unresolved issues. Before discussing the more important of these, it is useful to step back and to seek to identify where the project stood in 1996 in terms of its structure, its achievements and its problems.

(1) OVERVIEW OF THE 1996 DRAFT ARTICLES

(a) Part One. Origin of international responsibility

By 1996 international lawyers were very familiar with Ago's Part One, and a significant proportion of it (though by no means all) already reflected received thinking.[20] Part One was divided into five Chapters. The first, entitled "General principles" laid down certain general propositions defining the basic conditions for State responsibility. A central provision of this Chapter was article [3], which defined the two elements of an internationally wrongful act of a State: viz., conduct which was attributable to the State under international law and which constituted a breach of an international obligation of that State. No fewer than eleven articles of Chapter II elaborated the rules concerning attribution of the conduct of persons or entities to the State under international law. These articles were in three groups: five "positive" attribution principles specifying alternative circumstances

18 See *Yearbook . . . 1996*, vol. I, p. 31, para. 62, and G. Arangio-Ruiz, "Fine prematura del ruolo preminente di studiosi italiani nel progetto di codificazione della responsabilità degli Stati: specie a proposito di crimini internazionali e dei poteri del consiglio di sicurezza", *Rivista di diritto internazionale*, vol. 81 (1998), p. 110.

19 *I.L.C. Report . . . 1997*, A/52/10, paras. 30, 161.

20 The principal exception concerned the complex articles relating to "Breach of an International Obligation" in Chapter III of Part One (articles [16]–[26]), discussed below. Some doubts were still expressed concerning art. [33] ("necessity").

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521813530 - The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries
James Crawford
Excerpt
More information

in which conduct was attributable to the State (articles [5], [7], [8], [9] and [15]), two expressing qualifications on this first group of articles (articles [6] and [10]) and a third group of articles specifying circumstances in which conduct was *not* attributable to the State (articles [11], [12], [13] and [14]). The articles of Chapter II were cumulative but also limitative: in the absence of a specific undertaking, a State could not be held responsible for the conduct of persons or entities in any circumstance not covered by the positive attribution principles. This raised doubts as to whether the negative attribution clauses were really necessary.

Chapter III of Part One sought to analyse further the requirement already laid down in article [3] (b) that in every case of State responsibility there must be a breach of an international obligation *of* a State *by* that State. In addition to the controversial article on international crimes and delicts (article [19]), the eleven articles of Chapter III dealt with five matters. Articles [16], [17] and [19] (1) concerned the notion of a breach itself, emphasizing the irrelevance of the source of the obligation and its subject matter for the purposes of determining whether responsibility would arise from a breach. The first two paragraphs of article [18] dealt with the requirement that the obligation be in force for the State at the time of its breach; in effect, the intertemporal principle as applied to responsibility. Articles [20] and [21] elaborated upon the distinction between so-called obligations of conduct and result, and in a similar vein, article [23] dealt with obligations of prevention. Articles [24] to [26] dealt with the moment and duration of a breach, and in particular with the distinction between continuing wrongful acts and those not extending in time. They also developed a further distinction between composite and complex wrongful acts. Paragraphs (3) to (5) of article [18] sought to specify when continuing, composite and complex wrongful acts had occurred, and dealt with issues of intertemporal law in relation to such acts. Finally, article [22] dealt with an aspect of the exhaustion of local remedies rule, which was analysed within the specific framework of obligations of result.

Chapter IV dealt with certain exceptional cases where the conduct of one State, not acting as an organ or agent of another State, was nonetheless chargeable to the latter State even though the wrongfulness of the conduct lay (at least primarily) in the breach of the international obligations of the former. The articles dealt with three circumstances in which a State would be "implicated" in the internationally wrongful conduct of another State: first where a State provided aid or assistance to another State to facilitate the commission of a wrongful act (article [27]); second where the acting State was "subject to the power of direction or control of another State" (article [28] (1)); and third where the internationally wrongful act was committed by a State as the result of coercion exerted by another State (article [28] (2)).

The final Chapter of Part One, Chapter V, was entitled "Circumstances precluding wrongfulness". It specified six "justifications", "defences" or "excuses",

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521813530 - The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries
James Crawford
Excerpt
More information

precluding the wrongfulness of conduct otherwise a breach of an international obligation. These were consent (article [29]), countermeasures broadly defined (article [30]), *force majeure* and fortuitous event (article [31]), distress (article [32]), necessity (article [33]) and self-defence (article [34]). The effect of each of these circumstances was said to be "that of rendering definitively or temporarily inoperative the international obligation in respect of which a breach is alleged".[21] Chapter V was completed by article [35], which reserved the possibility of compensation for damage to an injured State by an act otherwise wrongful, but the wrongfulness of which was precluded under articles [29], [31], [32] and [33]. It had no application to countermeasures or self-defence.

(b) Part Two. Content, forms and degrees of international responsibility

Part Two consisted of four Chapters, dealing respectively with general principles, reparation, countermeasures and the consequences of international crimes.

Chapter I purported to state general principles applicable to Part Two. In fact it mainly consisted of introductory provisions (e.g., article [36] (1)) or saving clauses (e.g., articles [37], [38] and [39]), together with an extended "definition" of the injured State (article [40]). Of these by far the most important was article [40], which was a sort of umbilical cord between Parts One and Two, joining them at a single point. Indeed it is not too much to say that the two Parts otherwise led independent conceptual lives. The reason was that Part One focused on "the internationally wrongful act of a State", i.e. on the responsible State,[22] whereas Part Two was expressed entirely in terms of the rights or entitlements of "the injured State", defined in article [40].[23] Part One did not attempt to define injury, or to identify the State or other entity towards or in respect of which the act in question was wrongful. Or at most, it did these things implicitly, by using as a key concept "breach of an international obligation". It may have been understood thereby that injury is the breach of an obligation and the injured State is the State to whom the obligation is owed.[24] But this (we may call it the "subjective theory of responsibility") was never spelled out. Moreover, if the text was intended to reflect

21 Commentary to Chapter V of Part One, para. (9), text in *Yearbook . . . 1979*, vol. II (Part Two), pp. 106-109.

22 For "responsible State", Part Two used the clumsy and unhappy circumlocution "the State which has committed an internationally wrongful act" (see title to Part Two, Chapter II and *passim*: the phrase appeared fifteen times in Part Two). It was clumsy because of its length. It was unhappy because it was expressed in the past tense whereas the articles are concerned with current and continuing breaches and with cessation just as much as reparation.

23 See, e.g., art. [42]. The term "the injured State" was used twenty-eight times in Part Two. Art. [40] defined "injured State" and made it clear that a number of States, or indeed all States, could be "injured States" in certain cases involving human rights, obligations in the general interest or "international crimes". Thus while Part Two implied an individual or particular relation between the responsible State and the injured State, art. [40] apparently denied this in cases involving multilateral obligations, collective interests or "international crimes".

24 This may have been implicitly recognized in art. [33] (1) (b), which referred to "the State towards which the obligation existed".

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521813530 - The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries
James Crawford
Excerpt
More information

a subjective approach on such an important question, it might well have said so expressly – more particularly as Chapter I was generally interpreted as embodying an "objective" theory of responsibility in which neither actual harm or damage to another State nor "fault" on the part of the responsible State was defined as a necessary element of an internationally wrongful act.[25]

On the other hand, article [40] did not simply rely on the subjective theory. It sought to identify, in a non-exclusive way, the cases where a State or States might be considered to have a right which was the correlative of the obligation breached. These varied from the dyadic right–duty relationship of a bilateral treaty or a judgment of an international court between two States, to cases where the right arose under a rule of general international law or a multilateral treaty and all or many of the States bound by the rule or party to the treaty could be considered "injured". Article [40] (3) also stipulated that in the case of "international crimes", all other States were injured and had a right to act.

The rights of injured States thus defined, and the correlative obligations of the responsible State, were then set out in Chapter II. This Chapter identified two general principles of cessation and reparation, together with four forms of reparation: restitution in kind, compensation, satisfaction and assurances and guarantees against repetition. The general principle of reparation was subject to a number of qualifications, including a requirement for account to be taken in determining reparation of the contributory negligence or fault of the injured State or one of its nationals on behalf of whom the claim was brought. Several of the forms of reparation in Chapter II were also subject to limitations. Thus restitution in kind did not have to be provided in circumstances where it was materially impossible, contrary to a peremptory norm, disproportionate or capable of disproportionately jeopardizing the political independence or economic stability of the responsible State. Likewise, the right of the injured State to obtain satisfaction as a form of reparation did not justify demands which would "impair the dignity" of the responsible State. Chapter II proceeded on the assumption that restitution in kind was the primary form of reparation, notwithstanding the assertion in the commentary that compensation was "the main and central remedy resorted to following an internationally wrongful act".[26] There was no separate article on interest, although there was a fleeting reference to the possibility of an award of interest in the article dealing with compensation.[27]

Chapter III of Part Two dealt with the topic of countermeasures by an injured State. The first article, article [47], was a hybrid provision, giving a "definition"

25 To add to the confusion, the commentaries sometimes referred to issues of attribution as concerned with the "subjective" element of responsibility. In view of these conflicting meanings of the terms "subjective" and "objective", they have been avoided in the commentaries to the articles as finally adopted. But see A. Bleckmann, "The Subjective Right in Public International Law", *German Yearbook of International Law*, vol. 28 (1985), p. 144.

26 Commentary to art. [44], para. (1), text in *Yearbook . . . 1993*, vol. II (Part Two), p. 67.

27 Special Rapporteur Arangio-Ruiz had proposed an article on interest, but this was not referred to the Drafting Committee: see article 9, *Yearbook . . . 1989*, vol. II (Part One), p. 56; *Yearbook . . . 1990*, vol. II (Part Two), pp. 77-78. See also Appendix 1B, below, p. 339.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521813530 - The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries
James Crawford
Excerpt
More information

of countermeasures, referring to the limitations on countermeasures provided for in articles [48] to [50], and dealing with the position of third States in respect of countermeasures. Article [48] laid down certain procedural conditions for the taking of countermeasures, or for their continuation in force. It was by far the most controversial of the four articles adopted on first reading because of the link it established between the taking of countermeasures and compliance with dispute settlement obligations, whether under Part Three or pursuant to any other binding dispute settlement procedure in force between the injured and responsible States. Article [49] set out the basic requirement of proportionality as a condition for a legitimate countermeasure. A final provision, article [50], specified five categories of conduct which were prohibited as countermeasures: the threat or use of force, extreme economic or political coercion designed to endanger the territorial integrity or political independence of the responsible State, conduct infringing the inviolability of diplomatic or consular agents, premises, archives and documents, conduct derogating from basic human rights and any other conduct in contravention of a peremptory norm of general international law. This was a rather heterogeneous list, as lists tend to be.

Finally, Chapter IV dealt with the consequences of international crimes. In contrast to the gravity of an international crime of a State, as expressed in article [19], the consequences drawn from such a crime in articles [51] to [53] were rather limited. Under article [52], certain rather extreme limitations upon the obtaining of restitution or satisfaction were expressed not to apply in the case of crimes. Thus in the case of crimes an injured State was entitled to insist on restitution even if this seriously jeopardized the political independence or economic stability of the "criminal" State. Under article [53], there was a limited obligation of solidarity in relation to crimes, viz., not to recognize as lawful the situation created by the crime, not to render aid or assistance to the responsible State in maintaining the situation created by the crime, and to cooperate with other States in various ways so as to eliminate the consequences of the crime. Reasonable though these might seem in respect of a serious breach of basic rules of international law, they were hardly of a penal character. Part Two, Chapter IV did not provide for "punitive" damages for crimes, let alone fines or other sanctions. Nor did it lay down any special procedure for determining authoritatively whether a crime had been committed, or what consequences should follow: this was left for each individual State to determine *qua* "injured State". Article [40] (3) defined every State as individually injured by an international crime within the meaning of article [19]. This was, to say the least, a highly decentralized notion of crimes.

(c) Part Three. Settlement of disputes

Part Three dealt with settlement of disputes, unusually for an I.L.C. text, such matters normally being left to the Sixth Committee of the General Assembly or a

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521813530 - The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries
James Crawford
Excerpt
More information

diplomatic conference. Part Three established a hierarchical dispute settlement procedure referring disputing States first to negotiation (article [54]), then to conciliation (article [56]) and finally to arbitration if the parties agreed (article [58]). Two annexes to the Part set out the procedure for constituting a Conciliation Commission and an Arbitral Tribunal respectively. However, the intermediate steps of negotiation and conciliation could be bypassed where the dispute arose between States parties, one of which had taken countermeasures against the other. In such circumstances, the State which was the target of the countermeasures was "entitled at any time unilaterally to submit the dispute" to an Annex II arbitral tribunal (article [58] (2)). In this respect only was arbitration compulsory.

Thus Part Three had two distinct functions. The first was to provide for compulsory conciliation of disputes "regarding the interpretation or application of the present articles", followed by voluntary arbitration if the dispute was not thereby resolved. This was a "soft" and supplemental form of dispute settlement, which, like interstate conciliation generally, might be supposed in theory to work well but in practice, in situations of deep conflict such as that generated by many State responsibility disputes, was unlikely to work at all.[28]

The commentary, while referring to Part Three as "the general dispute settlement system",[29] failed to address the question whether a dispute concerning the interpretation or application of the primary obligations was covered by Part Three. Although it has happened, for example in the *LaGrand* case,[30] that the parties to a dispute agree that there has been a breach of the primary obligation and disagree only on the consequences, this is unusual. Disputes rarely concern only remedies for a breach; they almost always include disputes about whether there has been a breach in the first place, and what are the elements of the breach. In that respect, for example, the *Fisheries Jurisdiction* case,[31] the *Rainbow Warrior* arbitration[32] and the *Gabčíkovo-Nagymaros Project* case[33] are much more typical than *LaGrand*,

28 Perhaps the two best examples of successful "conciliation" in the modern period are the Iceland-Norway *Jan Mayen Continental Shelf Delimitation* case (the Conciliation Commission's Report is reproduced in *I.L.R.*, vol. 62, p. 108 (1981); *I.L.M.*, vol. 20 (1981), p. 797, and the resulting Agreement on the Continental Shelf between Iceland and Jan Mayen incorporating the Commission's recommendations is reproduced in *I.L.M.*, vol. 21 (1982), p. 1222), which was in all but form a maritime boundary arbitration, and the Papal Mediation in the *Beagle Channel* case (the Proposal of the Mediator, Suggestions and Advice is reproduced in *R.I.A.A.*, vol. XXI, p. 53, at p. 243 (1980), and the original tribunal's award is reported at *R.I.A.A.*, vol. XXI, p. 53 at p. 57 (1977), which occurred after an arbitral proceeding was rejected by one party). Generally on conciliation see J.-P. Cot, *International Conciliation* (trans. R. Myers) (London, Europa Publications, 1972); J.G. Merrills, *International Dispute Settlement* (3rd edn.) (Cambridge, Cambridge University Press, 1998), ch. 4; S. Koopmans, "The PCA in the Field of Conciliation and Mediation: New Perspectives and Approaches", in Permanent Court of Arbitration, *International Alternative Dispute Resolution: Past, Present and Future* (The Hague, Kluwer, 2000), p. 67.

29 See commentary to art. [54], para. (1), text in *Yearbook . . . 1995*, vol. II (Part Two), p. 352.

30 *LaGrand (Germany* v. *United States of America), Provisional Measures, I.C.J. Reports 1999*, p. 9; *Merits*, judgment of 27 June 2001.

31 *Fisheries Jurisdiction (Spain v. Canada)*, *I.C.J. Reports 1998*, p. 431.

32 *Rainbow Warrior (New Zealand/France)*, *R.I.A.A.*, vol. XX, p. 217 (1990).

33 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997*, p. 7.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
0521813530 - The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries
James Crawford
Excerpt
More information

even though in each of these cases the question of remedies, i.e. of secondary obligations in the field of responsibility, was central to the dispute.

Thus quite apart from the value of compulsory conciliation in practice, there was a key uncertainty with Part Three. Was a dispute as to whether there had been a breach of a primary obligation, not itself focusing for example on attribution or on the existence of a circumstance precluding wrongfulness, one "regarding the interpretation or application of the present articles"?[34] If not, how could the conciliators perform their function? For example how could they propose the form and amount of reparation due without determining whether there had been a breach, and in what respect? The answer seems clear. Even if the fundamental question between the parties concerns, for example, whether a treaty has been validly concluded or how it is to be interpreted — neither issue being covered by the Draft Articles — it would be necessary to answer those questions in order to determine whether there had been conduct inconsistent with an international obligation in force for the State concerned.[35] Thus the innocent formula "dispute regarding the interpretation or application of the present articles" in Part Three covered every dispute as to the existence of an internationally wrongful act of a State or its consequences within the field of responsibility, broadly conceived so as to cover cessation as well as reparation. The aim of conciliation may have been modest; the scope of the obligation to conciliate was not.

This became even more important when one turned to the second function of Part Three, that concerning countermeasures. Article [58] provided that:

> "2. In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles."

The essential difficulty with this provision was that it privileged the State which had committed an internationally wrongful act. Under Part Three, compulsory arbitration was only available where a "dispute arises between States Parties to

34 The phrase "dispute concerning the interpretation or application" of a treaty has been given a broad interpretation. See, e.g., *Mavrommatis Palestine Concessions, 1924*, *P.C.I.J., Series A, No. 2*, pp. 16, 29; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility*, *I.C.J. Reports 1984*, p. 392, at pp. 427-428, paras. 81, 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections*, *I.C.J. Reports 1996*, p. 595, at pp. 615-617, paras. 31-32; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection*, *I.C.J. Reports 1996*, p. 803, at p. 820, para. 51; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Preliminary Objections*, *I.C.J. Reports 1998*, p. 9, at p. 18, paras. 24-25; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *Preliminary Objections*, *I.C.J. Reports 1998*, p. 115, at p. 123, paras. 23-24.

35 See arts. [16], [18] (1).

© Cambridge University Press www.cambridge.org