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0521813530 - The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries

James Crawford

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THE INTERNATIONAL LAW COMMISSION'S
ARTICLES ON STATE RESPONSIBILITY
Introduction, Text and Commentaries

In 2001 the International Law Commission completed its work on State responsibility, begun forty years previously. The *Articles on Responsibility of States for Internationally Wrongful Acts* marks a major step in the codification and progressive development of international law, comparable in significance to the Vienna Convention on the Law of Treaties. The articles cover such topics as: attributing conduct to the State; defining when there has been a breach of international law and the excuses or justifications for breaches; reparation for injury; the invocation of responsibility, especially standing of States in the public interest; and the rules relating to countermeasures. The articles develop basic concepts of international law, in particular peremptory norms and obligations to the international community as a whole. They signal definitively how international law has moved away from a purely bilateral conception of responsibility to accommodate categories of general public interest (human rights, the environment, etc.).

This volume includes a full introduction, the text of the articles and commentary, plus a guide to the legislative history and a detailed index and table of cases. It will be an indispensable accompaniment to the I.L.C.'s work on this central topic of international law.

JAMES CRAWFORD is Whewell Professor of International Law and Director of the Lauterpacht Research Centre for International Law, University of Cambridge. As a member of the United Nation's International Law Commission since 1992, he was responsible for the first draft of the Statute for an International Criminal Court (1994), and as the Special Rapporteur on State Responsibility carried through the second reading of the articles on State responsibility (1998–2001). He has a substantial practice as counsel and arbitrator in international courts and tribunals.

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PREFACE

The Draft Articles on Responsibility of States for Internationally Wrongful Acts, with their commentaries, were finally adopted by the International Law Commission (I.L.C.) on 9 August 2001. They are the product of nearly forty years work by the I.L.C., guided by a series of Special Rapporteurs, F.V. García Amador (1955-1961), Roberto Ago (1963-1979), Willem Riphagen (1979-1986), Gaetano Arangio-Ruiz (1987-1996) and the present author (1997-2001). They are a contribution to the codification and progressive development of a fundamental chapter of international law. In that respect, potentially at least, they rank alongside the Draft Articles on the Law of Treaties of 1966 which became, with limited changes, the Vienna Convention on the Law of Treaties of 1969.

This book is intended as a companion to the Articles on State Responsibility. It sets out the English text of the articles and their commentaries.¹ To these have been added an index, table of cases, select bibliography and guide to the legislative history. For the purposes of comparison the text of the Draft Articles as adopted on first reading (1996) is included in an appendix, with a table of equivalents. The introduction seeks to place the articles in perspective and to give an account of the major issues encountered during the second reading.

I am very grateful to all those who assisted, directly and indirectly, in the work for this volume. The Leverhulme Trust made a generous grant towards research assistance over the three and a half years of the project. This was supplemented by the British Academy and by the Faculty of Law and the Lauterpacht Research Centre for International Law, University of Cambridge. Many individuals assisted in the work. They included, in particular, Pierre Bodeau, who worked on the project at the Research Centre for more than two years and enabled me to meet many deadlines – not least by acting also as overnight translator of my tortured English into good French. I benefited greatly from a series of gifted interns from New York University School of Law – Tom Hillbink, Sara Rakita, Sarah Pellet, Jacqueline Peel and Simon Olleson; my thanks to the equally gifted selection committees for these years, especially Greg Fox and later Ben Kingsbury. Simon Olleson, Jacqueline Peel and my doctoral student, Christian Tams, made major contributions to this book and to the huge task of drafting, revising and completing the commentaries. Christian contributed especially to the important commentaries on articles 42, 48 and 54. Jackie produced from my various reports and other sources

¹ The articles are taken from the final text contained in Chapter V of the Commission's Report on its Fifty-Third Session. They have been reformatted for this work.

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initial drafts of many others. Simon was enormously helpful in the task of putting it all together. I am also grateful to Dr John Barker of the Lauterpacht Research Centre for preparing a first draft of the commentary on article 36 (compensation) and to Sarah Heathcote of the University of Geneva for preparing a first draft of the commentary on article 25 (necessity). A group of younger scholars assisted with input on the literature and practice which was particularly necessary for a linguistically challenged Special Rapporteur: they were Andrea Bianchi, Carlos Esposito, Yuji Iwasawa, Nina Jørgenson, Yumi Nishimura and Stefan Wittich.

My colleagues at the International Law Commission were splendid companions in the collective work of revising and completing the text and the commentaries. I hope they will forgive me if I single out for particular thanks the four chairmen of the Drafting Committee during the second reading, Bruno Simma, Enrique Candioti, Georgio Gaja and Peter Tomka; as well as Teodor Meleşcanu who chaired a working group on the commentaries in 2001. Many other members of the Commission contributed substantially to the process, among whom I must mention Ian Brownlie, John Dugard, Constantin Economides, Zdzisław Galicki, Gerhard Hafner, Bob Rosenstock and Chusei Yamada. Alain Pellet challenged the work at every step in his tough, incessant way; many times he made me think again, and the work is much the better for it. Among the Secretariat I am particularly grateful to Mahnoush Arsanjani for her devoted work on the Project over many years and Arnold Pronto for his efficiency and friendly assistance.

I must thank many other people for their support in various ways during the project. They include: Daniel Bethlehem, Edward Helgeson, Glen Howard and Anne Skinner of the Lauterpacht Research Centre; Darren Peacock; David Wills, Squire Law Librarian, University of Cambridge; Pieter Jan Kuyper and other members of the W.T.O. legal office; Olufemi Elias and his colleagues at the U.N.C.C.; Peter Malanczuk who chaired an I.L.A. Working Group to comment on the second reading; Shabtai Rosenne; Vaughan Lowe, Frank Berman and Michael Wood whose input from a British perspective was most valuable; and Ronny Abraham, Directeur des Affaires juridiques au Ministère des Affaires étrangères and François Alabrune, Directeur adjoint, who gave similar assistance from the French side. In the last stages a willing group of I.L.C. alumni and attenders helped with checking and queries: Jonathan Halperin, Margo Kaplan, Larry Lee, Margaret Lewis, Carrie Noteboom, Dirk Pulkowski, Katja Peters, Christopher Timura.

I am most grateful to Finola O'Sullivan of Cambridge University Press and the Press editors for working so hard to see this volume through the Press so rapidly.

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NOTE ON SOURCES AND STYLE

The Annual Reports of the Commission to the General Assembly are initially published as Supplement No. 10 to the General Assembly's Official Records (thus the Report for the 55th session of the General Assembly 2000 is *G.A.O.R.*, A/55/10). They are eventually published in vol. II (2) of the *Yearbook of the International Law Commission*. Reports of the various Special Rapporteurs are even more eventually published in vol. II (1) of the *Yearbook*. The most recent volume to be published is *Yearbook 1997*, vol. I, containing the summary records of debates at the 1997 session. Thus neither the Special Rapporteur's reports (1998-2001) nor the summary records of the debates during the second reading are yet available in the *Yearbook*. A list of the former is given in Appendix I, below, p. 347. They are available in electronic form at <http://www.un.org/law/ilc/index.htm>, as well as at <http://www.law.cam.ac.uk/rcil/ILCSR/Statresp.htm>. A summary of the debates is contained in the *I.L.C. Report*, which for the years 1998-2001 is cited here as *I.L.C. Report . . . 1998*, etc.

The texts of the articles and commentaries printed here are precisely as adopted by the I.L.C. on 9 August 2001. There are however some minor divergences of style, due to the process by which the approved I.L.C. text is subsequently submitted to the vagaries of U.N. "house style" prior to its publication in the *Report*. The following points should be noted:

1. U.N. editors insist in inserting a capital letter in subparagraphs of articles, even though these do not begin complete sentences. This stylistic barbarism was not adopted in earlier texts such as the Vienna Convention on the Law of Treaties or the United Nations Convention on the Law of the Sea. It is not adopted here.
2. The footnote numbering in the commentaries tracks that in the Report, and therefore begins with footnote 33.
3. U.N. house style insists on substituting *ibid.* in certain cases where the inclusion of the full reference is both more correct and more informative. In such cases the original reference has been retained here.

A few other references have been corrected in the course of preparation of this volume for the press.

The above is in no sense intended as a criticism of the members of the Codification Division itself, who have to prepare a large volume of material under acute time pressure in order to allow for the timely publication of the Report.

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ABBREVIATIONS

<i>A.D.P.I.L.C.</i>	<i>Annual Digest of Public International Law Cases</i> (Cambridge, Grotius)
<i>A.F.D.I.</i>	<i>Annuaire Français de Droit International</i>
<i>A.J.I.L.</i>	<i>American Journal of International Law</i>
<i>A.S.I.L.</i>	<i>Proceedings of the American Society of International Law</i>
<i>B.Y.I.L.</i>	<i>British Yearbook of International Law</i>
de Lapradelle & Politis, <i>Recueil</i>	A. de Lapradelle and N. Politis, <i>Recueil des arbitrages internationaux</i> (Paris, Les Editions Internationales, 1954-1957)
<i>D.R.</i>	European Court of Human Rights, <i>Decision and Reports</i>
<i>E.C.H.R.</i>	<i>European Court of Human Rights</i>
<i>E.C.R.</i>	European Court Reports
<i>E.J.I.L.</i>	<i>European Journal of International Law</i>
<i>G.A.O.R.</i>	<i>General Assembly Official Records</i>
Hackworth, <i>Digest</i>	G.H. Hackworth, <i>Digest of International Law</i> (Washington, D.C., U.S. Government Printing Office, 1943)
<i>I.C.S.I.D. Reports</i>	<i>Reports of Cases Decided under the Convention on the Set- tlement of Investment Disputes between States and Nationals of Other States, 1965</i> (Cambridge, Grotius)
<i>I.C.J. Pleadings</i>	International Court of Justice, <i>Pleadings, Oral Arguments, Documents</i>
<i>I.C.J. Reports</i>	International Court of Justice, <i>Reports of Judgments, Advi- sory Opinions and Orders</i>
<i>I.C.L.Q.</i>	<i>International and Comparative Law Quarterly</i>
<i>I.L.C. Report . . .</i>	<i>Report of the International Law Commission to the General Assembly (General Assembly Official Records, Supplement No. 10)</i>
<i>I.L.M.</i>	<i>International Legal Materials</i>
<i>I.L.R.</i>	<i>International Law Reports</i> (Cambridge, Grotius)
<i>Inter-Am.Ct.H.R., Series A</i>	Inter-American Court of Human Rights, <i>Reports of Advisory Opinions</i>

<i>Inter-Am.Ct.H.R., Series C</i>	Inter-American Court of Human Rights, <i>Reports of Individual Claims</i>
<i>Iran-U.S.C.T.R.</i>	<i>Iran-US Claims Tribunal Reports</i> (Cambridge, Grotius)
Moore, <i>Digest</i>	J.B. Moore, <i>A Digest of International Law</i> (Washington D.C., U.S. Government Printing Office, 1906)
Moore, <i>International Adjudications</i>	J.B. Moore, <i>International Adjudications, Modern Series</i> (New York, Oxford University Press, 1929-1933)
Moore, <i>International Arbitrations</i>	J.B. Moore, <i>History and Digest of the International to which the United States Has Been a Party</i> (Washington D.C., U.S. Government Printing Office, 1898)
<i>O.J.E.C.</i>	<i>Official Journal of the European Communities</i>
<i>P.C.I.J., Series A</i>	Permanent Court of International Justice, <i>Collection of Judgments</i>
<i>P.C.I.J., Series B</i>	Permanent Court of International Justice, <i>Collection of Advisory Opinions</i>
<i>P.C.I.J., Series A/B</i>	Permanent Court of International Justice, <i>Judgments, Orders and Advisory Opinions</i>
<i>R.G.D.I.P.</i>	<i>Revue Générale de Droit International Public</i>
<i>R.I.A.A.</i>	United Nations, <i>Reports of International Arbitral Awards</i>
<i>R.T.A.F.</i>	<i>Recueil des Traités et Accords de la France</i>
<i>S.C.O.R.</i>	<i>Security Council Official Records</i>
<i>Secretariat Survey</i>	“‘Force majeure’ and ‘fortuitous event’ as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine”, <i>Yearbook . . . 1978</i> , vol. II, Part One, pp. 61-227
<i>U.K.T.S.</i>	<i>United Kingdom Treaty Series</i>
<i>U.N.T.S.</i>	<i>United Nations Treaty Series</i>
Whiteman, <i>Damages</i>	M. M. Whiteman, <i>Damages in International Law</i> (Washington, D.C., U.S. Government Printing Office, 1937-1943)
Whiteman, <i>Digest</i>	M.M. Whiteman, <i>Digest of International Law</i> (Washington D.C., U.S. Government Printing Office, 1963-1973)
<i>Yearbook E.C.H.R.</i>	<i>Yearbook of the European Court of Human Rights</i>
<i>Yearbook . . .</i>	<i>Yearbook of the International Law Commission</i>
<i>Z.a.ö.R.V.</i>	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>

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