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STATE RESPONSIBILITY UNDER INTERNATIONAL LAW: ANALYZING THE DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

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INTRODUCTION

The international legal order, unlike domestic legal systems, does not rest upon a centralised enforcement authority. Its coherence instead depends on a body of secondary rules that determine when a State has breached its obligations and what legal consequences follow from that breach. These secondary rules are collectively known as the law of State responsibility. Every primary obligation that a State owes, whether arising from treaty, custom, or a unilateral act, is rendered meaningful only when its breach triggers a determinate set of consequences. Without such a framework, international law would remain a system of aspirational commitments rather than binding norms.

The most authoritative articulation of this framework is found in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted on second reading in 2001 after nearly five decades of study.[1] Although the Draft Articles were never opened for signature as a treaty, the General Assembly commended them to States and they are now widely regarded as reflecting customary international law on the subject. This article examines the structure of the Draft Articles, focusing on attribution, breach, circumstances precluding wrongfulness, and the content of responsibility, before turning to the persistent gaps between the codified text and actual State practice.

HISTORICAL DEVELOPMENT AND THE WORK OF THE COMMISSION

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[1] Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, U.N. Doc. A/56/10 (2001) [hereinafter ILC Draft Articles].

The ILC first placed State responsibility on its agenda in 1955, but early efforts under Special Rapporteur García Amador focused narrowly on the treatment of aliens and their property, reflecting mid-century concerns about expropriation.[2]

It was only with the appointment of Roberto Ago as Special Rapporteur in 1963 that the project shifted toward a general theory of responsibility applicable to any primary obligation, distinguishing sharply between primary rules, which define the content of obligations, and secondary rules, which govern the consequences of their breach. This conceptual separation allowed the Commission to codify responsibility without having to resolve the substance of every primary rule of international law, a task of far greater magnitude. Subsequent Special Rapporteurs, including Willem Riphagen, Gaetano Arangio-Ruiz, and finally James Crawford, refined the draft through successive readings, culminating in the streamlined 2001 text that removed the more controversial provisions on State crimes that had featured in earlier drafts.

ATTRIBUTION OF CONDUCT TO A STATE

Article 2 of the Draft Articles establishes that an internationally wrongful act arises when conduct consisting of an action or omission is attributable to the State under international law and constitutes a breach of an international obligation.[3]

Attribution operates independently of a State's internal law; the classification of an organ as governmental for purposes of domestic administrative law does not determine whether its conduct is attributable for the purposes of international responsibility. Articles 4 through 11 set out the principal categories of attribution: conduct of State organs, conduct of persons or entities exercising elements of governmental authority, conduct directed or controlled by a State, conduct of insurrectional movements that later become the government, and conduct that a State subsequently acknowledges and adopts as its own.

The threshold for attributing the conduct of non-State actors to a State has generated considerable controversy, most notably in the divergence between the International Court of Justice's 'effective

[2] James Crawford, State Responsibility: The General Part 39-45 (Cambridge Univ. Press 2013).
[3] ILC Draft Articles, supra note 1, art. 2.

control' test articulated in the Nicaragua case and the International Criminal Tribunal for the former Yugoslavia's more permissive 'overall control' standard applied in Tadić.[4]

The International Court of Justice subsequently reaffirmed the effective control test in the Bosnian Genocide case, expressly declining to adopt the overall control standard for the purposes of State responsibility while acknowledging its relevance to individual criminal liability. This divergence illustrates a broader tension in the law of attribution between a rule calibrated for inter-State accountability and standards developed within international criminal law for a different purpose, namely establishing the existence of an armed conflict.

BREACH OF AN INTERNATIONAL OBLIGATION

Article 12 provides that a breach occurs when an act of a State is not in conformity with what is required of it by an obligation, regardless of the origin or character of that obligation.[5]

This formulation deliberately avoids reintroducing the earlier, and ultimately abandoned, distinction between ordinary delicts and international crimes of State, a distinction that had proved unworkable during the Commission's earlier readings. The Draft Articles instead address the temporal dimension of breach through Articles 14 and 15, distinguishing acts of instantaneous character from those of a continuing character, and introducing the notion of a composite act constituted by a series of actions or omissions that are defined in aggregate as wrongful. This distinction carries practical significance for questions of jurisdiction and admissibility before international tribunals, since a continuing breach may bring conduct that began before a tribunal's jurisdiction was established within its temporal reach.

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Chapter V of the Draft Articles enumerates six circumstances precluding wrongfulness: consent, self-defence, countermeasures, force majeure, distress, and necessity.[6]

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[4] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paragraph 115 (June 27).
[5] ILC Draft Articles, supra note 1, art. 12.
[6] ILC Draft Articles, supra note 1, arts. 20-25.

These circumstances do not terminate the underlying obligation; they merely excuse a particular instance of non-compliance, and the obligation revives once the circumstance ceases to exist. The plea of necessity under Article 25 has proved especially contentious in practice, since it permits a State to depart from an obligation only where doing so is the sole means of safeguarding an essential interest against a grave and imminent peril, and where the State has not contributed to the situation of necessity.

The International Court of Justice applied this standard restrictively in the Gabčíkovo-Nagymaros case, holding that Hungary could not invoke necessity where its own conduct had contributed materially to the peril it sought to avert.[7]

This restrictive approach reflects a broader concern among States and tribunals alike that a generous reading of necessity would provide an unacceptably wide escape route from binding obligations, particularly in the context of economic and environmental treaty commitments where the temptation to invoke unforeseen hardship is considerable.

CONTENT OF INTERNATIONAL RESPONSIBILITY: CESSATION AND REPARATION

Once responsibility is established, Article 30 requires the responsible State to cease the wrongful conduct if it is continuing and to offer appropriate assurances of non-repetition where circumstances so require, while Article 31 obliges the State to make full reparation for the injury caused.[8]

The Draft Articles adopt the classical formulation of reparation drawn from the Permanent Court of International Justice's decision in the Factory at Chorzów case, under which reparation must, as far as possible, wipe out all the consequences of the wrongful act and re-establish the situation that would have existed had the act not been committed. Article 34 identifies three forms that reparation may take, either singly or in combination: restitution, compensation, and satisfaction. Restitution is nominally the primary form of reparation, requiring the re-establishment of the situation that existed before the wrongful act, but it is frequently unavailable in practice where the underlying

[7]Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, paras 51-58 (Sept. 25).
[8]ILC Draft Articles, supra note 1, arts. 30-31.

harm is irreversible, as with loss of life, environmental degradation, or the destruction of cultural property, leaving compensation as the more commonly awarded remedy in inter-State litigation.

INVOCATION OF RESPONSIBILITY AND COUNTERMEASURES

Articles 42 and 48 distinguish between an 'injured State' entitled to invoke responsibility in its own right and other States with a legal interest in the performance of obligations owed to the international community as a whole, or erga omnes obligations, which may invoke responsibility even absent direct injury.[9]

This distinction reflects the Court's own recognition, since the Barcelona Traction case, that certain obligations are owed to the international community as a whole and that all States possess a legal interest in their observance. Chapter II of Part Three then regulates countermeasures, permitting an injured State to take otherwise unlawful measures against a responsible State in order to induce compliance, subject to strict conditions of proportionality, reversibility, and prior notification, and subject further to the overriding prohibition on countermeasures affecting fundamental human rights or peremptory norms.

CRITICAL ASSESSMENT: GAPS BETWEEN CODIFICATION AND PRACTICE

Notwithstanding their widespread citation before international courts and tribunals, the Draft Articles exhibit several persistent gaps when measured against actual State practice. First, the attribution rules for non-State actors remain ill-suited to contemporary conflicts involving decentralised armed groups, cyber operations conducted through proxies, and hybrid warfare, where the effective control threshold set by the Court is difficult to satisfy even where a State's involvement is otherwise apparent.

Second, the enforcement of responsibility remains heavily dependent on the consent-based jurisdiction of international tribunals, meaning that a considerable proportion of internationally wrongful acts never reach adjudication at all, leaving the invocation of responsibility to diplomatic protest, countermeasures, or inaction. Third, the erga omnes concept endorsed in Article 48 has been invoked with increasing frequency in recent litigation concerning grave breaches of international humanitarian law and human rights, yet its practical remedial value remains limited

[9] ILC Draft Articles, supra note 1, arts. 42, 48.

where the responsible State simply declines to comply with a tribunal's judgment, since the Draft Articles provide no independent enforcement mechanism of their own.

Finally, the treatment of reparation for mass or systemic harm, including environmental degradation and violations affecting large civilian populations, sits uneasily within a framework conceived primarily around discrete inter-State injuries, suggesting that further elaboration may be needed as international law confronts harms of a genuinely collective character.

CONCLUSION

The Draft Articles on Responsibility of States for Internationally Wrongful Acts represent one of the International Law Commission's most successful codification projects, distilling decades of fragmented practice into a coherent secondary framework capable of application across the entire span of international obligations. Their influence on the jurisprudence of the International Court of Justice and other tribunals confirms their status as an authoritative statement of customary international law. Yet the very generality that gives the Draft Articles their broad applicability also limits their capacity to address responsibility for the more diffuse and decentralised forms of State conduct that increasingly characterise contemporary international relations. Continued reliance on judicial elaboration, rather than further codification, therefore appears the more realistic path toward closing the remaining gaps between the text of 2001 and the practice of States today.