

**DRAFT ARTICLES ON STATE RESPONSIBILITY ADOPTED
BY THE INTERNATIONAL LAW COMMISSION IN 2001:
A BRIEF OVERVIEW***

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I. *Introduction*

The International Law Commission of the United Nations has finally completed nearly 50 years of work on State responsibility with its adoption of the second reading draft articles with commentaries at its fifty-third session in 2001.¹ The ILC then submitted them to the General Assembly with the recommendation that it take note of the draft articles on the responsibility of States for internationally wrongful acts in a resolution and annex the draft articles to such resolution. The Sixth Committee of the General Assembly discussed this matter and approved the draft resolution on 19 November without taking a vote.² The General Assembly has since adopted, without a vote, a resolution on “Responsibility of States for internationally wrongful acts” on 12 December 2001.³

This paper will provide a brief overview of the draft articles as a whole, referring mainly

* I am grateful to Professor John Middleton (Hitotsubashi University) for his assistance with this paper.

¹ The text of the draft articles and the commentaries thereto are reproduced in A/56/10, 2001, pp.43-365. See also the Statement of the Chairman of the Drafting Committee, Mr. Peter Tomka, on Responsibility of States for Internationally Wrongful Acts [State Responsibility] and the Addendum to it. These materials are available at the ILC’s website, <http://www.un.org/law/ilc/index.htm>. With respect to the main issues discussed at the 2001 session, see A/56/10, pp.33-41 (paras 45-67). See also Crawford/Peel/Olleson, The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading, *European Journal of International Law*, 2001, pp.963-991.

² With respect to the Sixth Committee’s discussions regarding the draft articles, see Press Releases, GA/L/3188, 29 October 2001; GA/L/3189, 31 October 2001; GA/L/3190, 1 November 2001; and GA/L/3199, 19 November 2001.

³ A/RES/56/83, 12 December 2001. See also Press Release, GA/9998, 12 December 2001.

to the commentaries attached thereto by the ILC. Due to constraints on the length of this paper, however, the author will focus on several salient differences between the final text and the first reading text of 1996⁴ and the Draft Committee's second reading text provisionally adopted in 2000.⁵

II. *Scope of the Draft Articles*

Article 1 provides that “[e]very internationally wrongful act of a State entails the international responsibility of a State.” Although placed at the top of Part One, which deals with conditions for the existence of an internationally wrongful act of a State, this article relates to the scope of the draft articles as a whole. Article 1 should therefore be read in conjunction with the articles of Part Four, entitled “General Provisions,” which consist of three “without prejudice” clauses with respect to individual responsibility, the responsibility of international organizations, and the applicability of the United Nations Charter (Articles 58, 57 and 59 respectively) as well as two “reservation” clauses for possible general rules on State responsibility other than the draft articles (Article 56) and for special rules on State responsibility (Article 55). The scope or framework of the draft articles may be summarized as follows.

First, the draft articles are concerned with *State* responsibility only. Thus, the responsibilities of other subjects of international law, such as individuals or international organizations, are beyond their scope (Articles 58 and 57). Secondly, only responsibility for *wrongful acts* is at issue here. States should sometimes pay monetary compensation for damage arising from their lawful activities, as in the case of the lawful nationalization of foreign companies.⁶ But this is an obligation to compensate under relevant primary rules of international law. Thirdly, the draft articles deal with the international responsibility of a State for *every* internationally wrongful act. The object of the codification is thus not limited to a specific branch of international law, such as the treatment of aliens. Fourthly, the ILC intended to codify *general rules* of State responsibility, which operate in an interstate relationship and are applicable in principle to any violation of the rules of international law. Special regimes of State responsibility established by international treaties or customs and applicable to certain specific breaches of international obligations are, therefore, beyond their scope (Article 55). Finally, the term

⁴ The Draft Articles on first reading are reproduced in their entirety in *Yearbook of the ILC*, 1996, Volume II, Part Two, pp.58-65. Rosenne has also compiled and edited a useful guide to the first reading articles of Part One and the commentaries thereto in *The International Law Commission's Draft Articles on State Responsibility: Part I, Articles 1-35*, 1991.

⁵ Discussions at the 2001 session were based on the Drafting Committee's text of 2000, which can be found at A/CN.4/L.600*, 21 August 2000, and has been reproduced in A/55/10, 2000, pp.124-140. With respect to this text, see Crawford/Bodeau/Peel, *The ILC's Draft Articles on State Responsibility: Toward Completion of a Second Reading*, *American Journal of International Law*, 2000, pp.660-674; Cassese, *International Law*, 2001, pp. 182-211; and Kawasaki, *The Content and Implementation of the International Responsibility of States: Some Remarks on the Draft Articles on State Responsibility adopted by the ILC's Drafting Committee in 2000*, *Hitotsubashi Journal of Law and Politics*, Vol.29, 2001, pp.25-40. See also Peel, *New state responsibility rules and compliance with multilateral environmental obligations: Some case studies of how the new rules might apply in the international environmental context*, *Review of European Community and International Environmental Law*, 2001, pp.82-97.

⁶ A/56/10, p.62.

“international responsibility of a State” covers *new and secondary* legal relations or situations arising from the internationally wrongful act of the State. These new legal relations include not only the wrongful State’s obligation to make reparation, but also the right of a State to take countermeasures.

It can be said that the framework of the draft articles seen above has been consistently maintained throughout the codification process of both the first and second reading texts. While there is no need to comment on the first and second points, we can observe some interesting developments in the codification efforts between the first and second readings with respect to the following points.

Regarding the third point, one of the major differences between the two texts resides in the fact that the second and final text is clearly more conscious of the existence of the collective or community interests of States in international law and its repercussions for the State responsibility regime. It is true that paragraph 2 of the first reading *Article 40*,⁷ entitled “Meaning of injured State,” referred to multilateral treaties or customary international law for the protection of the collective interests of States as well as human rights and fundamental freedoms. However, this was not necessarily reflected in the other first reading articles, subsequent to *Article 40*, on reparation and countermeasures.

It is also true that *Articles 19, 40 and 51 to 53* of the first reading text were concerned with the well-known concept of “international crimes of State,” which results from the serious breach of an international obligation for the protection of fundamental interests of the international community as a whole. Nevertheless, the first reading text did not sufficiently articulate each element of this concept. By way of example, *Article 40, paragraph 3*, stated that where the internationally wrongful act constituted an international crime, all States other than the wrongful State should be deemed to be injured States. This is not, however, because the wrongful State committed an international crime, but rather because it breached an obligation *erga omnes*, or to the international community as a whole, contained in a norm of general international law. It follows that it would not be necessary to employ international crimes in order to justify, for example, the possible right of taking countermeasures by all other States against a breach of community obligations. The more attention is given to the function of the concept of obligations *erga omnes* or obligations to the international community as a whole in the State responsibility regime, the less reference is made to the concept of the international crimes of State.

The rise and fall of “international crimes of State” reminds us again of the fourth aspect of the codification framework, namely, the codification of general and interstate rules on State responsibility only. There has been much discussion within and outside the ILC on the roles of United Nations organs, including the Security Council, General Assembly and International Court of Justice, in cases of international crimes of State. However, no reference was ultimately made to these organs in either the first draft or the final text. It must be said that this was an inevitable consequence of the general law limitation on the codification since no international organization, including the United Nations, is based upon general international law. On the other hand, *Article 52*⁸ in the first reading text and paragraph 1 of Article

⁷ The first reading draft articles will be italicized hereafter.

⁸ The first reading *article 52* intended to set aside, in the case of international crimes, some of the limitations and restrictions laid down with respect to restitution and satisfaction.

42⁹ in the 2000 Drafting Committee's text — although both were ultimately deleted — appear to be vestiges of a struggle to codify possible legal consequences of international crimes *within* the limits of the framework of general and interstate rules.

With respect to the fifth and final point, the scope of new and secondary relations appears to have been expanded in the second reading text in comparison with the first one. In the second reading text, the “responsible State” is not limited to the State that breached an international obligation, and the State entitled to invoke the responsibility of another State is not limited to the State whose right was infringed. However, my observations suggest that this expansion is not as real as it appears. This is discussed in Sections VI and VIII below.

III. *Attribution of the Conduct of a Territorial Unit of a State*

Part One of the 1996 first reading text contained 11 articles in a Chapter II entitled “The ‘Act of the State’ under International Law.” The counterpart Chapter II, “Attribution of Conduct to a State,” in the 2001 text comprises 8 articles defining the conditions under which conduct is attributable to a State under international law. The reduction in the number of articles in Chapter II resulted mainly from the deletion of such “non-attribution” clauses as *Articles 11, 12 and 13*.¹⁰ Hence, the basic structure and substance of this chapter remain unchanged despite the reorganization of the remaining articles and insertion of a new article (Article 11 “Conduct acknowledged and adopted by a State as its own”).

Putting aside Articles 6 and 10 for the moment,¹¹ the remaining articles appear to form two groups: Articles 4, 5 and 7 are concerned with State organs, whereas Articles 8, 9 and 11 relate to the circumstances where the conduct of a person or group of persons, not being an organ of a State, should nevertheless be deemed to be an act of the State under international law. The core of the articles can be illustrated as follows:

	Acting in the capacity of an organ		Acting as a private person
	Governmental activities	Non-governmental activities	
Organ of the central government of the State	(B)	(C)	
Organ of a territorial unit of the State	(D)	(G)	(A)
Entity empowered by the law of the State	(E)	(H)	
Person directed or controlled by a State	(F)	(I)	

⁹ Article 42, paragraph 1 of the 2000 text provided that “[a] serious breach within the meaning of article 41 may involve, for the responsible State, damages reflecting the gravity of the breach”: A/CN.4/600*, 21 August 2000, p.11.

¹⁰ By way of example, *Article 11, paragraph 1* of the first reading text stipulated that the conduct of a person or group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

¹¹ Article 6 is discussed in Section VI below. Article 10 deals with the attribution of the conduct of a successful insurrection movement to the eventual new government or State under international law.

First, there is no doubt that the private activities of a person, whether an official of a State or not, are not considered to be acts of the State (A).¹² Second, it is also obvious that governmental or sovereign activities of a State organ constitute acts of the State (B). Third, the question of whether the non-governmental activities, including commercial ones, of a State organ may also be attributed to the State for the purpose of State responsibility is worth discussing (C). Some mention is made of this in the commentary to Article 4: “It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as ‘commercial’ or as ‘*acta iure gestionis*’. Of course the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purpose of article 4, and it might in certain circumstances amount to an internationally wrongful act.”¹³

Thus, it is safe to assume that all activities, governmental or not, of an organ of a State are attributable to the State for the purposes of State responsibility ((B) and (C)). In fact, Article 4 (Conduct of organs of a State), and its counterpart *Articles 5 and 6* of the first reading text, suggest no limitation or reservation in this regard. It also follows that the same would hold true with respect to Article 8.

Article 8 (Conduct directed or controlled by a State)

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

The commentary to Article 8 confirms this: “The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence. In such cases, it does not matter that the person or persons involved are private individuals nor whether their conduct involves ‘governmental activity’.”¹⁴

In contrast to the cases above — i.e. (B), (C), (F) and (I) — conduct of an organ of a territorial unit of a State or an entity empowered by the law of the State were, according to *Article 7* of the first reading text, presumed attributable to the State only to the extent that the organ was exercising elements of the governmental authority of the State ((D) and (E)).¹⁵ Thus, non-governmental activities of territorial units of the State or entities empowered by the State were not attributed to the State as a matter of course ((G) and (H)). In this regard,

¹² See note 10 above.

¹³ A/56/10, p.87 (para 6). For irrelevancy of the distinction between *acta iure gestionis* and *acta iure imperii* for the purpose of State responsibility, Crawford, First report on State responsibility, A/CN.4/490/Add.5, 22 July 1998, pp.10-11 (paras 176-178).

¹⁴ A/56/10, p.104 (para 2).

¹⁵ *Article 7* (Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority)

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

Professor Condorelli has insightfully suggested that the same thinking or rationale in relation to situation (I) under Article 8 would apply to (G) and (H), meaning that non-governmental activities of territorial units of the State or entities empowered by the State would be attributed to the State if so directed or controlled by that State.¹⁶

Reviewing the final draft articles of 2001 against this background, one can find one apparently modest, but actually significant change in Article 4, namely, that an organ of a territorial unit of a State is elevated to the status of a formal organ of the State. Article 4, paragraph 1 provides:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.¹⁷

The effect of this elevation appears twofold. First, with respect to governmental activities, it would not be necessary to ascertain whether an organ was really exercising elements of governmental authority in a particular case in order to attribute the conduct of the organ of a territorial unit of a State to such State. It would be sufficient that the conduct appeared to be by a person or persons constituting an organ of a territorial unit of the State. Second, in relation to non-governmental activities, such activities by an organ of a territorial unit of a State would be attributed *ipso facto* to the State, even if they were not directed to do so or controlled by the State.

There can be no doubt that this new proposal by the ILC with respect to the position of territorial units under Article 4 is preferable for narrowing the possibility of States making excuses to avoid their mandate under international obligations. On the other hand, we cannot say with any confidence whether the points mentioned in the preceding paragraph would be ascertained in State practice and be regarded as firmly established as a rule of customary law.¹⁸ More research is necessary regarding this point.¹⁹

¹⁶ Condorelli, L'imputation a l'Etat d'un fait internationalement illicite: Solutions classiques et nouvelles tendances, *Recueil des Cours*, 1984-VI, tome 189, p.75.

¹⁷ A/56/10, p.84. Crawford already considered that local and regional governmental units are covered by articles 5 and 6, and hence, article 7, paragraph 1 should be deleted. Crawford, First report, *cit.*, pp.14-15 (paras 190-191) and A/CN.4/490/Add.6, 24 July 1998, p.3.

¹⁸ The ILC has cited, as an evidence of the conviction by States in this matter, the following episode: during the preparatory work for the Conference for the Codification of International Law of 1930, governments were asked whether the State became responsible as a result of acts or omissions of bodies *exercising public functions of a legislative or executive character* (communes, provinces, etc.) and all answered in the affirmative (A/56/10, p.88 (para 8)). Although it is true that this constitutes compelling evidence for the purpose of Article 7, paragraph 1 of the first reading text (see *Yearbook of the ILC*, 1974, II-1, p.278 (para 4)), the same would not hold true with regard to the new proposal. Namely, if they were asked the question without the italicized part, the answer might have been different one or with some qualifications.

¹⁹ For the purpose of "jurisdictional immunities of States and their property," according to the ILC's draft articles on this subject in 1991, "State" is presumed to comprise three main categories: (1) the State and its various organs of government, (2) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State, and (3) agencies or instrumentalities of the State and other entities, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State. Constituent units of a federal State are conceived as something in between the first and second categories (Draft Article 2, paragraph 1 (b), *Yearbook of the ILC*, 1991, II-2, pp.14-18). Turning to the matter at hand, "a territorial unit of a State" under Article 4, paragraph 1 amounts to the political subdivision of a State (the second category above), which includes autonomous regions of a State. The distinction between the second and third

IV. *An Act of a State Not Having a Continuing Character*

Chapter III of Part One deals with “Breach of an international obligation.” While the first reading Chapter III consisted of eleven articles, the new Chapter III contains only four: Articles 12 to 15. The chapter offers some basic rules for determining whether there has been a breach of an international obligation, the time at which it occurred, and its duration. Articles 12 (Existence of a breach of an international obligation) and 13 (International obligation in force for a State) relate to the first concern, and Articles 14 and 15 to the second and the last. Here we will direct our attention to the latter two articles.

Article 14 (Extension in time of a breach of an international obligation)

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15 (Breach consisting of a composite act)

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.²⁰

Although both articles were intended to provide for the time at which a breach of an international obligation occurred and the duration of such breach, the expressions they employ appear uneven. In Article 14, paragraph 1 refers only to the time at which a breach of an

categories appears to be narrow. However, while the ILC’s commentary notes that entities in the third category do not enjoy any jurisdictional immunity beyond or outside the sphere of acts performed by them in the exercise of the sovereign authority of the State (*ibid.*, p.17 (para 14)), no such comment is made in relation to the second category. It follows that, in the hypothetical case of a regime of absolute immunity, commercial activities of entities in the second category, including territorial units, may enjoy immunity, but ones in the third may not. Comparing this observation to the position of territorial units under State responsibility, one could say that Article 4 of the final text on State responsibility appears somewhat consistent with the treatment of territorial units under State immunity.

By contrast, for the purpose of the formation of customary international law, Section 8 of the London declaration on this subject made by the International Law Association in 2000 stated that “[t]he activities of territorial governmental entities within a State which do not enjoy separate international legal personality do not as such normally constitute State practice, unless carried out on behalf of the State or adopted (‘ratified’) by it.” Statement of principles applicable to the formation of general customary international law, in ILA, *Report of the Sixty-ninth Conference (London)*, 2000, p.727.

²⁰ For Articles 14 and 15 and the commentaries thereto, see A/56/10, pp.138-150.

international obligation occurred, and paragraph 2 is concerned only with the duration of the breach. Paragraph 3 of Article 14 and Article 15 deal with both elements, but Article 15 provides two separate paragraphs for that purpose. To make them even, such a phrase as “and the act does not continue” should be inserted before “even if its effects continue” in Article 14, paragraph 1. With respect to paragraph 2, the expression “occurs at the moment when the act begins and” may be inserted between “character” and “extends.” Article 15 may be reintegrated into Article 14 as a single paragraph like *Article 25, paragraph 2* of the first reading text.

More problematic would be the concept of “an act of a State not having a continuing character,” which is found in Article 14, paragraph 1. Does this mean all acts of a State other than “an act of a State having a continuing character” in paragraph 2? The answer must be no. If it were in the affirmative, paragraph 1 would also cover an Article 15-type situation — i.e. a breach consisting of a composite act — because the concept of “composite act” is evidently different from that of “continuing act” as defined in paragraph 2 of Article 14. In short, while a continuing (wrongful) act consists of a single act of some duration in time, such as the unlawful detention of a foreign official,²¹ a composite act under Article 15 consists of a series of actions or omissions, each of which may be legal or illegal. By contrast, paragraph 1 of Article 14 is intended to cover only so-called “instantaneous acts,” such as the shooting down of an aeroplane. To avoid this kind of misconception, it may be better to go back to the old, less elegant distinction made in *Articles 24 and 25* of the first reading text between “an act of a State not extending in time,” which was equal to the abovementioned instantaneous act, on the one hand, and “an act of a State extending in time,” which included a composite act as well as a continuing act, on the other.²²

V. *Peremptory Norms Within the Context of Circumstances Precluding Wrongfulness*

One of two surprising articles in the final text of the ILC, in comparison with the second reading text provisionally adopted by the Drafting Committee in 1998, 1999 and 2000, is Article 26 in Chapter V (Circumstances precluding wrongfulness) of Part One.

Article 26 (Compliance with peremptory norms)

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 29 *bis*, provisionally adopted by the Drafting Committee in 1999 and renumbered as Article 21 in 2000, had the same title as Article 26 above, but provided that “[t]he wrongfulness of an act of a State is precluded if the act is required in the circumstances by a peremptory norm of general international law,”²³ which was quite different from the content

²¹ For examples of continuing wrongful acts, see A/56/10, p.139 (para 3).

²² This distinction is also meaningful in the context of Article 30 (a), which provides that the responsible State is under an obligation to cease the illegal act “if it is continuing.” Such a “continuing” situation is undoubtedly wider than a continuing act under Article 14, paragraph 2 and may well be covered by the concept of “an act of a State extending in time.” In relation to this point, see Kawasaki, *The Content and Implementation of the International Responsibility of States: Some Remarks on the Draft Articles on State Responsibility adopted by the ILC’s Drafting Committee in 2000, op. cit.*, p.27. We will return to this point in Section VII below.

²³ A/CN.4/L.574, 9 July 1999, p.4. With respect to the discussion of this provision in the ILC, see A/54/10, 1999, paras 306-318. As for the Drafting Committee’s view, see A/CN.4/SR.2605, 9 August 1999, pp.11-12.

of Article 26 in terms of its object. In fact, Chapter V of the first reading text had already referred to the concept of “a peremptory norm of general international law” twice, in paragraph 2 of *Article 29* (Consent) and paragraph 2 (a) of *Article 33* (State of necessity),²⁴ both of which had intended not to preclude the wrongfulness of an act of a State contrary to a peremptory norm of general international law. It could be said that the ILC has returned to the idea embodied in *Articles 29 and 33* of the original first reading text.

Unlike these two articles, however, the new Article 26 has no limitation in scope and extends to all the circumstances precluding wrongfulness provided in Chapter V of Part One. Article 26 reminds us, especially in relation to self-defence (i.e. one of the circumstances precluding wrongfulness recognized under Article 21), of the famous advisory opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons* in 1996. Paragraph 2 E of the operative part of the opinion was as follows:

E. By seven votes to seven, by the President’s casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstances of self-defence, in which the very survival of a State would be at stake.²⁵

It must be recalled that Paragraphs 2 C and D preceded this paragraph:

C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.²⁶

These paragraphs lead one to speculate that, at an earlier stage of the drafting of the operative part, the second sentence of E may have followed C and the first sentence of E followed D. Then, at a later stage before the vote, the controversial second sentences of both paragraphs were separated therefrom and combined as paragraph 2 E, to be adopted dramatically by the President’s casting vote. If this speculation is correct, then paragraph 2 E, as a whole, would be nothing more than a juxtaposition of the result of two lines of consideration, namely, the legality of threat or use of nuclear weapons in terms of self-defence (C) and humanitarian law (D). The possible conflict between the first and second sentences in

²⁴ For *Articles 29 and 33* of the first reading text, see *Yearbook of the ILC*, 1979, II-2, pp.109-115 and *Yearbook of the ILC*, 1980, II-2, pp.34-52.

²⁵ *ICJ Reports 1996 (II)*, p.266.

²⁶ *Ibid.*

paragraph E remains unresolved.²⁷

The ILC's Draft Articles on State Responsibility appear to furnish an answer to this problem. First, Article 21 states that the wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations. Secondly, the commentary to Article 40 indicates that "[i]n the light of the International Court's description of the basic rules of international humanitarian law applicable in armed conflict as 'intransgressible' in character, it would also seem justified to treat these as peremptory."²⁸ Thirdly, returning to Article 26, the wrongfulness of any act of a State not in conformity with an obligation arising under a peremptory norm of general international law is not precluded. Finally, Article 26 and its commentary indicate no excuse or justification for avoiding this principle in relation to self-defence. It would follow from these that the problem of the conflict between self-defence and humanitarian law appears to be resolved here, at least in relation to the *use* of nuclear weapons, in favour of humanitarian law.

VI. *Responsible States Other Than States Breaching International Obligations*

One of my major concerns regarding the final draft articles resides in issues of the scope of the subject of the new and secondary legal relationship arising from an internationally wrongful act of a State: First, who is responsible for the internationally wrongful act of the State? Second, who is entitled to invoke the responsibility? With respect to these, the 1996 first reading text was simple and unequivocal. That is, according to the text, those who breached an international obligation were responsible for that illegal act, and a State whose right was infringed by that illegal act was entitled to invoke the responsibility against the wrongdoing State. Thus, it could be said that, under this construction, the subjects, active or passive, of the new and secondary legal relationship were exactly the same as those of the old and primary legal one. The 2001 final text does not, however, appear to follow this construction. We will discuss the question of responsible State in this Section and the question of invoking State in Section VIII below.

Under the present draft articles, there may be at least six different situations in which more than one State may be implicated in the internationally wrongful act of a State. First, two or more States may jointly carry out an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation. Secondly, two States may act through a common organ that carries out such conduct as a joint authority responsible for the management of a boundary river.²⁹ In these two cases, the conduct in question will be attributable, according to such normal attribution clauses as Articles 4 and 5, to each relevant State and each of them will be responsible for their own illegal acts. Thirdly, Article 6 states that "[t]he conduct of an organ placed at the disposal of a State by another State shall be

²⁷ In her dissenting opinion, Judge Higgins, appositely remarked that "[w]hat the Court has done is reach a conclusion of 'incompatibility in general' with humanitarian law; and then effectively pronounce a *non liquet* on whether a use of nuclear weapons in self-defence when the survival of a State is at issue might still be lawful, even were the particular use to be contrary to humanitarian law": *ICJ Reports 1996 (II)*, p.590 (para 29).

²⁸ A/56/10, p.284 (para 5).

²⁹ These two situations are mentioned in the commentary to Article 47 (Plurality of responsible States), A/56/10, p.314.

considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.” Under this article, the conduct attributed to the former State will constitute a wrongful act of that State and only that State will be responsible for its own act.

The remaining three possible circumstances are all dealt with in Chapter IV, entitled “Responsibility of a State in Connection with the Act of Another State,” of Part One. Article 16 in Chapter IV provides that a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so. According to the commentary thereto, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible for the act of the assisted State as such. The assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act.³⁰ A fundamental question still remains: Why, in the final analysis, is the aiding or assisting State responsible for its own act of aid or assistance to another State? In this regard, it must be recalled that the counterpart *Article 27* of the first reading text stated that “[a]id or assistance by a State to another State, ... itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.”³¹ If that were the case, the aiding or assisting State is, together with the three abovementioned cases, only responsible for its own illegal act.³² Thus, in all four cases considered above, States are ultimately responsible for their own illegal acts.

Article 17 provides that a State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act. In this case, the former State comes to be responsible for the illegal act of another State. The ILC’s commentary takes, as examples, the relationship between the dominant State and the dependent State under a “protectorate” or the situation of military occupation of the territory of the latter State by the former State.³³ However, even in such cases, there appears to be some scope for arguing that the former State is responsible for its own illegal act. One possible explanation is that the organ of the latter directed State, whose illegal conduct is at issue, may

³⁰ A/56/10, pp.159 and 155.

³¹ It is interesting to note that Article 16 and the commentary thereto are silent on this point: A/56/10, pp.155-160.

³² Moreover, one may ask whether the situation described in Article 16 would truly be a matter of secondary rule of responsibility in international law. One might transcribe Article 16 into such a primary rule of conduct as “no State shall aid or assist another State in the commission of an internationally wrongful act by the latter.” Crawford has already pointed out, in his Second Report, this primary rule characteristic of Article 16 (*Article 27*): A/CN.4/Add.1, 1 April 1999, pp.5-6. Padelletti, in her interesting book on this subject, concluded that, in light of the relevant State practice, there is no general rule, applicable to any illegal act, which prohibits assistance of the wrongful acts of another State. She maintained that the prohibition on assistance is limited to certain cases, such as the obligation to prevent the State’s territory from being used for the internationally wrongful acts and the obligations not to assist the use of force or the violation of human rights, including apartheid: Padelletti, *Pluralità di Stati nel fatto illecito internazionale*, 1990, pp.219-221. The above transcription is something akin to the expression of Article 41, paragraph 2, which states that “[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.” In spite of the similarity of expression, it is safe to assume that Article 41, on its part, constitutes a secondary rule because it is intended to operate *after* the occurrence of the main (serious) breach of an obligation.

³³ A/56/10, pp.161 (para 2) and 163 (5).

play a dual role: as a formal organ of the latter State, the conduct of which is attributed to the State under Articles 4 and 5 on the one hand, and as a *de facto* organ of the directing State, the conduct of which is attributed to the State through Article 8³⁴ on the other. The responsibility for the illegal acts will be distributed to each State according to the degree of control exercised by the controlling State.

Article 18 (Coercion of another State)

A State which coerces another State to commit an act is internationally responsible for that act if;

- (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and
- (b) The coercing State does so with the knowledge of the circumstances of the act.

Article 18 relates to the last and sixth case of the implication of more than one State in an illegal act of a State. This article is very similar to Article 17 in expression. The only difference is that Article 18 makes no mention of an actual internationally wrongful act of any State. Article 18 states only that “[a] State which coerces another State to commit an act...” According to the commentary,³⁵ this is because, in such circumstances, the wrongfulness of the coerced State would be precluded as *force majeure*. This explanation raises, however, the fundamental question of whether the responsibility of the coercing State under this article is covered in the Draft Articles. That is because, as we have seen in Section II, the scope of the Draft Articles has been strictly limited to the responsibility arising from an internationally wrongful act, while no internationally wrongful act is found in an Article 18-type situation.³⁶ If one considers that the coercion under Article 18 would be an extreme form of direction or control under Article 17, it might be possible to apply our argument regarding Article 17 to Article 18.

VII. *Demands for Non-repetition and Assurances and Guarantees of Cessation*

I have already discussed, in a previous paper,³⁷ Article 30 of the 2000 Drafting Committee’s text on cessation and non-repetition in comparison with the former *Articles 41 and 46* of 1996. Article 30 of the final text follows the content of Article 30 of 2000 without modification. Only one comment may be added to my previous arguments on this topic.

³⁴ Article 8 (Conduct directed or controlled by a State) states that “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or the group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”: A/56/10, p.103. This raises questions as to how the directions to or control over a State (Article 17) are different from those towards a person or group of persons (Article 8). In fact, the direction or control by the directing State to the directed one normally circulates through the chains of command of the latter State to a person or group of persons constituting an organ of the latter State. Unless there is some weakening of the direction through the chain of command, the difference appears marginal.

³⁵ A/56/10, p.166 (paras 2-4).

³⁶ Even if it were, the situation under Article 18 might be explained with the combined effect of Article 23 (*Force majeure*) for the act of the coerced State and of Article 27 (b), which states that the invocation of a circumstance precluding wrongfulness is without prejudice to the question of compensation for any material loss caused by the act in question, for the coercing State’s “responsibility”: A/56/10, pp.183 and 209.

³⁷ Kawasaki, *The Content and Implementation of the International Responsibility of States: Some Remarks on the Draft Articles on State Responsibility adopted by the ILC’s Drafting Committee in 2000*, *op. cit.*, pp.26-28.

Article 30 (Cessation and non-repetition)

The State responsible for the internationally wrongful act is under an obligation:

- (a) To cease that act, if it is continuing;
- (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

	Cessation	Non-repetition
Mere	Article 30 (a)	(A)
Assurances and guarantees of	(B)	Article 30 (b)

While cessation is concerned with wrongful acts extending over a period of time — i.e. continuing acts and composite acts — non-repetition relates to acts already finished, including instantaneous acts. While mere cessation or non-repetition is no more than (delayed) observance of primary obligations being breached or already breached, assurances and guarantees of cessation or non-repetition require the wrongdoing State to do something new and additional. Starting from this premise, the above table intends to show that Article 30 may, in reality, only cover half of the entire scenario concerning cessation and non-repetition. In my previous paper, I argued that the injured State may also demand, as envisaged in (A), that the wrongdoing State not repeat the (already finished) illegal act and that Article 30 (a) should be modified to accommodate such possibility. My new proposal here relates more to situation (B). My contention is that there may be a case where the wrongful State is under an obligation to offer appropriate assurances and guarantees of *cessation* of the (continuing) wrongful act. It might be odd to think of this kind of circumstance because the wrongful State is supposed to cease that act immediately. In this sense, my proposal may appear to undermine the obligation of cessation incumbent upon the State committing the continuing wrongful act under Article 30 (a).

Nevertheless, it may, in certain circumstances, be difficult or virtually impossible for a State to stop continuing its wrongful act immediately. In such a case, demands for assurances and guarantees of cessation within a certain period of time may be made to the State. For example, within the context of making the mandates under the Kyoto Protocol effective, the following draft provision was proposed at the COP-6 of the Framework Convention for Climate Change held in Bonn in July 2001:

Article 14 (Consequences applied by the enforcement branch)

1. Where the enforcement branch has determined that a Party is not in compliance with Article 5, paragraph 1 or 2, or Article 7, paragraph 1, of the Protocol, it shall apply the following consequences, taking into account the cause, type, degree and frequency of the non-compliance of that Party:
 - (a) Declaration of non-compliance; and
 - (b) Development of a plan in accordance with paragraphs 2 and 3 below.
2. The Party not in compliance under paragraph 1 above, shall, within three months after the determination of non-compliance or such other period that the enforcement branch considers appropriate, submit to the enforcement branch for review and assessment a plan that includes:
 - (a) An analysis of the causes of non-compliance of the Party;

- (b) Measures that the Party intends to implement in order to remedy the non-compliance; and
- (c) A timetable for implementing such measures within a time frame not exceeding twelve months which enables the assessment of progress in the implementation.³⁸

While it is true that the proposed non-compliance procedure, as a whole, should be regarded as special rules of State responsibility under Article 55, at least to the extent that such organizational element as the enforcement branch [of the compliance committee] is involved, there is scope for arguing that States may demand, *under general international law*, that the wrongful State offer appropriate assurances or guarantees of cessation, if circumstances so require. This assertion may be underpinned by the fact that Article 43, paragraph 2 (a) indicates that “[t]he injured State may specify in particular the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing.”³⁹

VIII. *Invoking States Other Than States Whose Rights Have Been Infringed*

Under Part Two of the first reading text, a State whose (primary legal) right was infringed by the breach of the corresponding obligation by another State was entitled to invoke the responsibility of the latter State (*Article 40, paragraph 1*).⁴⁰ By contrast, it is not clear, under the new Part Three (The Implementation of the International Responsibility of a State), whether it is necessary for a State, in order to be entitled to invoke the responsibility of another State, to have had its primary right infringed by the latter State.

In fact, under Part Three, there are three different types of States who are entitled to invoke the responsibility of another State: First, a State to which the obligation breached is owed individually (*Article 42 (a)*). Second, if the obligation breached is owed to a group of States or the international community as a whole, any State member of the group or any State (other than the wrongdoing State) (*Article 48, paragraph 1 (a) and (b)*). Third, among the second category of States mentioned above, a State which was specially affected by the breach of the obligation (*Article 42 (b)(i)*), or if the breach of the obligation radically changes the position of all other States with respect to the further performance of the obligation, any State member of the group or any State (other than the wrongdoing State) (*Article 42 (b)(ii)*).

With respect to the first category of States, it is safe to assume that they will be entitled

³⁸ Consolidated negotiating text proposed by the President; Addendum: Decisions concerning procedures and mechanisms relating to compliance under the Kyoto Protocol, FCCC/CP/2001/2/Add.6, 11 June 2001, p.13. This provision has been incorporated, with minor changes, in “The Marrakesh Accords & The Marrakesh Declaration” of 10 November 2001 as paragraphs 1 and 2 of XV (Consequences applied by the enforcement branch) under Section L (Procedures and mechanisms relating to compliance under the Kyoto Protocol). One could argue that non-compliance with an obligation would be different from a breach of the obligation. However, according to Article 12 of the 2001 Draft Articles, a breach of an obligation is equivalent to a non-conformity with what is required by that obligation. There seems to be no difference between non-compliance and non-conformity in their connotations. It would follow that “non-compliance” of obligations appears to be nothing but an euphemistic expression of “breach” of obligations.

³⁹ A/56/10, p.301. In contrast, it is odd that no mention is made in Article 43, paragraph 2 of assurances and guarantees of non-repetition.

⁴⁰ For my analysis of the first reading *Article 40*, see Kawasaki, The “Injured State” in the International Law of State Responsibility, *Hitotsubashi Journal of Law and Politics*, Vol.28, 2000, pp.17-31.

to invoke the responsibility of another State because their (primary) individual rights were infringed.⁴¹

By contrast, while it is certain that the second category of States had no primary individual rights from the beginning, the ILC did not go so far as to say that they are entitled to invoke the responsibility of another State because their primary collective *rights* were infringed. It seems that the term “right” was too strong for the ILC to describe the relevant legal situations.⁴² Use of the term “legal interest” was also avoided in this context. That is because, according to the commentary of the ILC, that term would not permit a distinction to be made between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.⁴³ But in any event, it cannot be denied that there was some kind of primary legal relations between the wrongful State and them because the (primary) obligation was *owed to them*.⁴⁴

The third type of invoking States consists of two sub-categories. The first one is specially affected States under Article 42 (b)(i). The commentary explains that “a State may be specifically affected by the breach of an obligation to which it is a party, *even though it cannot be said that the obligation is owed to it individually*” [italics added] and mentions, as an example, “a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the 1982 Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach.”⁴⁵ Respectfully though, according to my own observation, the reason why, in such a case, those coastal States parties should be considered as injured by the breach is not because the obligation for the protection of the high seas environment was breached, accompanied by some particular injury to them, but because the obligation not to cause harm

⁴¹ The commentary by the ILC to Article 42 also confirms this point: A/56/10, p.296 (para 5).

⁴² I have argued that there will be no obstacle to use of the term “collective right” to describe the relevant legal situations: Kawasaki, *The Content and Implementation of the International Responsibility of States: Some Remarks on the Draft Articles on State Responsibility adopted by the ILC’s Drafting Committee in 2000*, *op. cit.*, p.34.

⁴³ A/56/10, p.319 (para 2).

⁴⁴ Article 48, paragraph 1 (a) provides that any States other than an injured State [under Article 42] is entitled to invoke the responsibility of another State if the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group. The commentary goes on to say that the owing of the obligation to a group of States and the protection of a collective interest are two distinct conditions to be met for a State to invoke the responsibility of another State under this paragraph: A/56/10, p.320 (para 6). However, in the author’s opinion, these two conditions are, in reality, nothing more than two sides of the same coin. It must first be recalled that this “owe to” formula has been used by the ILC not for the purpose of indicating the addressees of the rule containing the obligation at issue. The commentary to Article 42 shows that even obligations under a rule of general international law or a multilateral treaty may be owed to a State individually: A/56/10, p.297 (para 6). Rather, this formula relates to the nature of the interest to be protected under the obligation in question. Thus, the reason why one can say that the obligation is owed to a group of States is that the interest under the obligation is a collective one and not able to be allocated to each member State. Still, one might say that the second condition would be necessary to distinguish the situation under this paragraph from that under Article 42 (b). It is evident, however, that the entitlement of invoking responsibility under Article 42 (b) is *stronger* than the one under this paragraph in the sense that the Article 42 (b) State is entitled to ask the wrongful State to make reparation *to it*. Thus, an additional condition, if necessary, must be inserted, not in Article 48, paragraph 1 (a), but rather in Article 42 (b), to the effect that the obligation is established for the protection of an individual interest of the State (along with the protection of a collective interest of a group).

⁴⁵ A/56/10, pp.296 (para 5) and 299-300 (12).

to the territories of other States was breached.⁴⁶ Thus, it could be said that the latter obligation was owed to the coastal States individually and the individual rights of the States were infringed.⁴⁷ The same would hold true for the second sub-category of States, the States whose position was radically changed by the breach of the obligation with respect to the further performance of the obligation (Article 42 (b)(ii)). The examples given in the commentary are disarmament and nuclear-free zone treaties.⁴⁸ Again, the obligation at issue in this case is to be considered as one owed to all the other State parties not (or not only) collectively, but (also) individually.

In summary, among the States entitled to invoke the responsibility of another State under Part Three, the primary rights of only the first category of States were infringed. With respect to the second category, the ILC appears to be tactically avoiding the question. As for the third, the expression proposed by the ILC gives us the impression that some factual influences or effects of the breach of an obligation might elevate a State to the status of (directly) injured State. The uncertainty residing in the second and third points are caused by the fact that the ILC has been attempting to avoid using the term “right” in drafting the final text. This may be understandable to some extent as a matter of drafting policy intended to avoid unproductive doctrinal controversies among the ILC members regarding such concepts as “legal rights” or “legal interests.” However, it undoubtedly makes the argument on this subject an extremely difficult and complex one. I will try to develop my argument below on this topic, in line with the expression of the ILC draft articles, without using the word “right” for States.⁴⁹

With respect to invoking States, one thing certain, even under the draft articles, is that all three types of invoking State, under Article 42 (a), Article 48, paragraph 1, and Article 42 (b) respectively, are States to which some kind of primary obligation has been owed.⁵⁰ Thus, the reason why they are entitled to invoke the responsibility of another State is the same for all three categories of States, namely, that the (primary) obligations breached were owed to them.

⁴⁶ In fact, Article 194, paragraph 2 of the Convention explicitly states that States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment.

In the *MOX Plant* case arbitration under Annex VII of the Law of the Sea Convention, Ireland has claimed that discharges of radioactive wastes into the Irish Sea by the United Kingdom are not only incompatible with its obligation “to protect and preserve the marine environment” (Article 192 LOSC), but also incompatible with its obligation “to ensure that activities under [the United Kingdom’s] jurisdiction or control are so conducted as not to cause damage by pollution to [Ireland]” (Article 194(2)) [square brackets are original]: ITLOS, In the dispute concerning the MOX plant, international movements of radioactive materials, and the protection of the marine environment of the Irish Sea (Ireland v. United Kingdom), Request for provisional measures and statement of case of Ireland, 9 November 2001, pp.49-50 (para 113). Ireland went on to state, at the provisional measures procedure before the ITLOS, that, pending the outcome of the arbitration procedure, it has the right, arising under Article 192, 194, 207 and 212 of LOSC, not to be subject to any accidental discharges from the MOX plant: *ibid.*, p.51 (117).

⁴⁷ In addition, when the coastal States attempt to ask the International Court of Justice to order provisional measures to protect their coasts against pollution, they will, be placed in a difficult position if the obligation breached was not owed to them individually. To obtain an order of provisional measures from the Court, they must prove that their “right” was infringed or is endangered (Article 41 of the Statute of the ICJ).

⁴⁸ A/56/10, p.300 (para 13).

⁴⁹ It is interesting to note that the ILC has not hesitated to use “right” in relation to a person or entity other than a State, as in Article 33, paragraph 2: A/56/10, p.233.

⁵⁰ With respect to the States under Article 42 (b), I have argued that two different obligations, collective and individual, were owed to them simultaneously.

They are on the same footing in terms of invoking responsibility in their relations with the wrongful State. Starting from this, the (injured) States under Article 42 (a) and (b) have an additional entitlement: demanding that the wrongful State make reparation *to them*. The reason why they are entitled to do so is neither because the relevant primary obligations were owed to them (if so, the States under Article 48 would also be able to do so), nor because the relevant primary obligations were owed to them *individually*.⁵¹ Rather, it is because they have suffered personally such damage as is defined in Article 31, paragraph 2. Thus, first, the question of whether a State is entitled to invoke the responsibility of another State is to be answered according to whether the primary obligation breached by the latter State was owed to the former State or not. Second, the question of whether a State is entitled to demand that the wrongful State make reparation *to it* is to be answered according to whether the former State has suffered the relevant damage personally or not. It follows that whether the obligation breached was owed to the entitled State individually or collectively has no relevance to the two questions above.

IX. *Lex Specialis* Within the Draft Articles

Article 55 (*Lex specialis*)

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

As noted in my previous paper, in spite of the title “*Lex specialis*” and the words “special rules” employed in this article, *general* international law rules may govern, under this article, specific conditions for the existence of an internationally wrongful act or specific content or implementation of the international responsibility of a State.⁵² In short, the reference to “special rules” of international law is made in this article only in terms of content, and not in terms of addressee.

The entire Draft Articles on State Responsibility can be characterized as residual because they constitute a set of rules applicable in general and will be applied residually in concrete

⁵¹ This calls for a long comment. By way of example, at such an early stage of diplomatic protection that the right of an individual national or company under a treaty or customary international law was infringed but available local remedies are not yet exhausted, it can be said that the corresponding obligation was breached because, under Article 12, there is a breach of the obligation when the act of the territorial State is not in conformity with what is required of that State by the obligation. It can also be said that the obligation breached was owed, at interstate level, to the national State individually. However, at this initial stage, the national State, even though the obligation to which it was owed individually has been breached, is not entitled to demand that the wrongful territorial State make reparation *to it*. The only thing that the national State can do at this stage is demand legally, even if not available in international courts or tribunals, that the wrongful State make reparation *to the beneficiary of the obligation breached*. It should be noted that this position of the national State is much the same as that of the States under Article 48. Why? Because *neither* the national State nor the States under Article 48 *suffered* the damage under Article 31, paragraph 2 *personally* (but, at the same time, the obligations that were owed to the national States and the States under Article 48 were equally breached).

⁵² Kawasaki, *The Content and Implementation of the International Responsibility of States: Some Remarks on the Draft Articles on State Responsibility adopted by the ILC's Drafting Committee in 2000*, *op. cit.*, p.38 (note 29).

cases. Nevertheless, “special rules of international law” referred to in Article 55 may also be identified only residually because their special nature in terms of content will be clarified only after all the relevant general rules on State responsibility have been safely settled.⁵³ In this sense, an examination must be made as to whether each article and paragraph in the final text would really constitute a general rule on State responsibility in terms of content. In this regard, at least three parts of the Draft Articles may be closely related to Article 55.

First, Article 25, paragraph 2 (a) states that necessity may not be invoked by a State as a ground for precluding wrongfulness if the international obligation in question excludes the possibility of invoking necessity. This provision clearly refers to the situation where States may narrow, by treaty or custom, the circumstances precluding wrongfulness in relation to a particular international obligation.⁵⁴ In this context, this paragraph appears somewhat to be a kind of branch of Article 55, and does not, therefore, seem to constitute, in itself, a general rule of State responsibility.

Second, Chapter III (Serious Breaches of Obligations Under Peremptory Norms of General International Law) of Part Three consists of two articles, Articles 40 and 41. Of these, paragraphs 1 and 2 of Article 41 (Particular consequences of a serious breach of an obligation under this Chapter) are particularly pertinent to our discussion here.

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining the situation,

It is not the aim of this paper to discuss the problem of “serious breaches of obligations under peremptory norms of general international law,” which must be descended from the much-discussed “international crimes of State,” nor to analyze the contents of the paragraphs. Our concern here is whether the obligations of all States other than the wrongful State envisaged under the paragraphs would really constitute a part of the general regime of State responsibility within the scope of the Draft Articles, as we have seen above in Section II. Although I would not go so far as to oppose the insertion of these articles (as a matter of drafting policy and because of their importance) in the final text, the obligations in question should, strictly and analytically speaking, be regarded as a special regime of State responsibility under Article 55. The regime under Article 41 is not of such character as to be applied, in principle, to any breach of any obligation. Rather, it attaches specific legal consequences to the serious breach of a certain limited category of obligations, i.e. obligations under peremptory norms of general international law.⁵⁵ The title itself of Article 41 appears to eloquently support this argument.

Third, together with Article 26 mentioned in Section V above, the other surprising clause,

⁵³ Accordingly, it may be the case that treaty provisions referring to the content or implementation of the international responsibility of a State, in reality merely restate general rules of State responsibility contained in the Draft Articles.

⁵⁴ With respect to Article 25, paragraph 2 (a) and the commentary thereto, see A/56/10, pp.194-206, esp.204-205. The first reading text already contained a similar clause in its Article 33, paragraph 2 (b): see *Yearbook of the ILC*, 1980, II-2, pp.34-52, esp.50-51.

⁵⁵ Some may reject my argument on the ground that the obligations at issue are supposed to be of general international law. That is certainly true. However, as I mentioned at the top of this Section, it is true only in terms of addressee. What matters here is whether the regime under Article 41 is general or specific in terms of content.

in comparison with the 2000 Drafting Committee's text, is Article 54 of Chapter II (Counter-measures) of Part Three.

Article 54 (Measures taken by States other than an injured State)

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.⁵⁶

One may pose the question of whether Article 54 would refer the problem of measures taken by States other than an injured State to special rules of international law under Article 55. The answer, however, would be no. The truth is that the ILC declared, through Article 54, a kind of legislative *non liquet* to the problem of countermeasures by what are traditionally called not directly injured States.⁵⁷ In other words, the ILC could not conclude definitively whether, under general international law, States whose collective interests were infringed by a wrongful act of a State may or may not take countermeasures against that State. In this sense, it can be said that Article 54 rather constitutes a branch or paragraph of Article 56.

Article 56 (Question of State responsibility not regulated by these articles)

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

X. Conclusions

We have examined the draft articles adopted by the ILC in 2001 from four different angles: the framework or scope, basic structure or guiding principles, contents of each article and paragraph, and wording or expressions in the articles. The conclusion of our brief examination of the draft articles in this paper can be summarized as follows.

With respect to the framework or scope of the draft articles, there are several articles or paragraphs that are to be regarded, strictly or analytically speaking, as being outside the scope of the draft articles. First, the provision of Article 16 (Aid or assistance in the commission of an internationally wrongful act) should be considered a primary rule of conduct. Second, while the particular consequences of a serious breach of a *jus cogens* obligation under Article 41, paragraphs 1 and 2 do constitute secondary rules, they are to be regarded as a sub-system of State responsibility under Article 55.⁵⁸

⁵⁶ A/56/10, p.349.

⁵⁷ For recent discussions on this problem, see Leben, *Contre-mesures*, *Répertoire international*, 1998, Dalloz, pp.7-8 (paras 46-55). Iovane contends that there exists no general regime of collective countermeasures, Iovane, *La tutela dei valori fondamentali nel diritto internazionale*, 2000, pp.193-390.

⁵⁸ I might add that rules specifically relating to the regime of diplomatic protection, such as Article 44 (a) providing for the nationality of claims, should also be regarded as a *general* sub-system of State responsibility under Article 55: see Kawasaki, *The "Injured State" in the International Law of State Responsibility*, *op. cit.*, pp. 26 and 31 and Kawasaki, *The Content and Implementation of the International Responsibility of States: Some Remarks on the Draft Articles on State Responsibility adopted by the ILC's Drafting Committee in 2000*, *op. cit.*, pp.30 and 36 (note 25). It may also be added that the scope of Article 20 (Consent) might be diminished, if certain parts of the object of the article can be well explained, not by the unilateral act of consent, but by the

With respect to the basic structure of the draft articles, our attention has focused principally on the problem of the scope of the subjects, passive and active, in new and secondary legal relations. In contrast to Part Two of the first reading text, Parts Two and Three of the final draft articles appear to expand the scope. On the one hand, a State not committing a wrongful act by itself should nevertheless be responsible for a wrongful act by another State under such circumstances as a direction or coercion by the former State towards the latter (Articles 17 and 18). On the other hand, a State whose primary right does not seem to have been infringed may nonetheless be entitled to invoke the responsibility of the wrongdoing State under paragraph 1 of Article 48 (Invocation of responsibility by a State other than an injured State) and Article 42 (b) (specially affected States or States whose position with respect to the further performance of an obligation was radically changed by the breach of the obligation). However, in my opinion, we should return to the original idea of the first reading text so that, at least under the general regime of State responsibility, only wrongful States are responsible for their own wrongful acts and only States whose primary rights have been injured are entitled to invoke the responsibility of the States who have breached the corresponding obligations. That would mean that the directing or coercing State under Articles 17 and 18 may be regarded as a State that has breached some international obligations by itself. On the other hand, States under paragraph 1 of Article 48 may be considered as States whose collective rights were infringed by the breach of the corresponding obligations, and States under Article 42 (b) as States whose individual rights were infringed. The reason why I adhere so much to the simple idea of the equality between primary and secondary relationships in terms of subject is that, in my (perhaps biased) opinion, the interstate and general legal order in which the draft articles are expected to work does not seem to be so sophisticated as to differentiate between the subjects of secondary relations with as much subtlety as has been envisaged in the final text.

Turning to the third point, the contents of each article, our far-from-exhaustive examination of the draft articles leads us to extract the following three types of rules. First, some articles appear to be more or less excessive in light of the relevant existing (or reasonably presumed to be existing) rules of international law. Article 4 (Conduct of organ of a State, especially concerning a territorial unit) might be categorized in this group. Second, there is, conversely, at least one article in which the content falls short of describing the whole object of the article: Article 30 (Cessation and non-repetition). Third, there is one article through which the ILC substantially abandoned, at this stage of the codification, a declaration of the existence or non-existence of a possible general regime of State responsibility: Article 54 (Measures taken by States other than an injured State).

With respect to the last point, inadequacy in terms of the wording or expression of articles, we can refer to the notion of "an act of a State not having a continuing character" in Article 14, paragraph 1 as an example.

concept of agreement between the relevant States. In such a case, the reason why the act of a concerned State is not wrongful is not because the wrongfulness of the act was precluded in terms of State responsibility, but because, as a matter of the law of treaties, the agreement, as special rules, took precedence over the conflicting general rules. It must be recalled that the commentary to *Article 29* of the first reading text emphasized the agreement nature of this circumstance precluding wrongfulness. *Yearbook of the ILC*, 1979, II-2, pp.190-110 (para 3).

Having said that, however, there can be no doubt that the Draft Articles on State Responsibility adopted by the ILC in 2001 constitute, as a whole, a remarkable contribution, not only to the identification of the rules relating to the international responsibility of States, but also to the clarification of the whole structure of modern international law. More specifically, it may be said that they constitute an important and essential element of the international “law of obligation” of States.⁵⁹ States, international courts and tribunals, and international scholars will continue to refer to them to ascertain the present state of law of responsibility in international law.

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Today, the international legal order at large can, or should, be conceived as “a system of (three) systems,” namely, municipal law, the law of international organizations, and interstate law. Whereas international law rules are produced mainly within the interstate legal order as treaties and customs among States, they will be applied in all the three legal orders mentioned above. In light of this fact, I must remark that the Draft Articles on State Responsibility elaborated by the ILC relate solely to the application of treaty rules and customary rules within the interstate legal order. After a brief survey of the draft articles as a whole, we need to bear in mind this premise.

It follows that, in order to illustrate the whole scenario of the possible legal consequences arising from breaches of international obligations by States, it will not be sufficient to dwell on the interstate aspect of State responsibility. First, we have also to draw our attention to the application of international law rules within municipal law (the internal or domestic application of international law) as well as through competent international bodies or organs (international control or supervision). Second, we have then to investigate how these three legal orders relate to each other following breaches of international obligations. From the viewpoint of interstate law, municipal law and the law of international organizations are regarded as sub-systems of it (and perhaps vice versa).⁶⁰ It could be said, in this regard, that Article 55 (*Lex specialis*) may serve as a clause linking the law of international organizations and interstate law. Similarly, Article 44 (b) (the rule of exhaustion of local remedies) may serve as a link between municipal law on the one hand, and the law of international organizations and interstate law on the other. I might also add that the guiding principle underlying these linking clauses would be “effectiveness.”

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⁵⁹ In fact, the ILC refers not so much to the sources of international rules as to the sources of international obligations: A/56/10, p.61 (para 4). Crawford refers to the notion of the international law of obligation, Crawford, *Responsibility to the international community as a whole*, p.3. This article is available at the web site of Lauterpacht Research Centre for International Law: <http://www.law.cam.ac.uk/rcil/home.htm>

⁶⁰ Combacau, *Le droit international: bric-à-brac ou système?* *Archives du philosophie du droit*, tome 31, (le système juridique), 1986, pp.94-95.