

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*

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I. *Introduction*

The International Law Commission of the United Nations is now planning to finalize at last its work on the Draft Articles on State responsibility in 2001 after a half-century of discussion. The ILC already finished its second reading of Part One of the Draft Articles, entitled "The internationally wrongful act of a State" by 1999. At the end of its fifty-second session in 2000, the Drafting Committee of the ILC has presented its Draft Articles on Part Two, Part Two *bis* and Part Four. In the next session, they will be considered by the ILC, and the final text of the whole Draft Articles will be adopted.

In this paper, we will examine some major issues involved in Part Two and Part Two *bis* of the Drafting Committee's text. Compared to the text of Part Two at the first reading, entitled "Content, forms and degrees of international responsibility", as adopted in 1996, there are two major structural changes in the draft articles presented by the Drafting Committee. First, accepting the proposal by the Special Rapporteur Crawford, the Committee made a distinction between the consequences flowing from a wrongful act and their invocation. As a result, Part Two, renamed "Content of international responsibility of a State", deals mainly with various new or continuing obligations incumbent upon a responsible State, whereas Part Two *bis*, newly proposed and entitled "The implementation of State responsibility", is concerned with the invocation of responsibility and taking of countermeasures by other States. Second, the original Article 37 (*Lex specialis*) and Article 39 (Relationship to the Charter of the United Nations) are, together with the newly proposed two "without prejudice" clauses on

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the responsibilities of international organizations and of individuals, incorporated into Part Four, entitled "General Provisions". This part is designed to apply to the entire draft articles.

This paper intends to examine, among other things, the question of when and to what extent a State may invoke the responsibility of, and if necessary may take countermeasures against, another State.¹ Before doing so, some general observations will be made on the regimes of cessation and non-repetition of wrongful acts and reparation. However, this is only to the extent that they relate to our direct concern, and a detailed article-by-article analysis of the Drafting Committee's proposals is beyond the scope of this paper. In addition, our examination will be extended to the problem of the possible legal consequences of "serious breaches of essential obligations to the international community". My tentative proposals on the draft articles on State responsibility will be presented with italics at the bottom of each section.

II. *Cessation and Non-repetition of Internationally Wrongful Acts*

The first reading text concerning cessation and non-repetition of internationally wrongful acts was Draft Articles 41 and 46. Article 42, Paragraph 1, adopted on the first reading, originally enumerated assurances and guarantees of non-repetition as one form of reparation, along with restitution in kind, compensation and satisfaction. In his third report on State responsibility, however, the Special Rapporteur combined three of the first reading articles, Articles 36, paragraph 1 (continued duty of wrongdoing State), 41 and 46, into one single Article 36 *bis*, which was entitled "Cessation". Although the Drafting Committee separated them out again from the continued duty of the responsible State (Article 29), it kept cessation and non-repetition together, as suggested by the Special Rapporteur, in Article 30.

Article 30 [41, 46] (Cessation and non-repetition)²

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.

Although the single treatment of cessation and non-repetition in one article is entirely consistent with my argument made previously,³ some difficulties still remain as to the formulation of the obligation to cease the continuing wrongful act, in terms of subject, object and implication of the obligation.

¹ I have published an article on the notion of "injured State" in the previous volume of this Journal. This paper is, accordingly, intended to constitute a supplement to it, following up the Drafting Committee's proposals in August 2000. See Kawasaki, The "injured State" in the International Law of State Responsibility, *Hitotsubashi Journal of Law and Politics*, Vol. 28, February 2000, pp. 17-31.

² The text of Article 30 [41, 46], A/CN.4/L.600*, 21 August 2000, p. 8 (reproduced in A/55/10, 2000, p. 131.); the explanation on the article by the Chairman of the Drafting Committee, Gaja, A/CN.4/SR.2662, 4 September 2000, pp. 6-8; Draft Article 36 *bis* proposed by the Special Rapporteur, Crawford, A/CN.4/507, 15 March 2000, pp. 21-26 (paras 44-59); the discussion on Article 36 *bis* at the ILC, A/55/10, pp. 23-5 (paras 75-77), pp. 28-30 (paras 83-91) and pp. 35-6 (paras 109-110); Draft Articles 6 (Cessation) and 10 *bis* (Non-repetition) of Part Two provisionally adopted by the ILC on its first reading, and the commentaries thereto, *Yearbook of the ILC*, 1993, II-2, pp. 55-58 and 81-83.

³ Kawasaki, The "injured State"..., *cit.*, p. 24.

First, with regard to the subject of the obligation, Article 30 refers not to “the State which has committed an internationally wrongful act” (Crawford’s Article 36 *bis*), but to “the State responsible for the internationally wrongful act”. This is because, according to the explanation⁴ by the Chairman of the Drafting Committee, Gaja, a State might not actually have committed a wrongful act itself, but could be held responsible for the act of another State. This explanation immediately reminds us of Article 18 [28] (Coercion of another State), which provides that a State which coerces another State to commit an internationally wrongful act is internationally responsible for that act.⁵ This being the case, it would be odd to demand, under Article 30 (a), that the coercing State cease the internationally wrongful act when that State has not committed that act itself.

Second, as to the object of the obligation, Article 30 requires a responsible State to cease an internationally wrongful act, “if it is continuing”. Under Article 36 *bis* (a) proposed by Crawford, what should be ceased is “a continuing wrongful act”.⁶ The Chairman of the Drafting Committee reported the reason: “... Some Members of the Commission had felt that the wording was unnecessarily restrictive. The Drafting Committee had agreed that subparagraph (a) should also apply to the situations where a State had violated an obligation on a *series* of occasions and had taken the view that the term “continuing” could be understood as covering such situations. It had simplified the wording of the subparagraph and the new wording “cease that act, if it is continuing” was broader in scope and therefore preferable”. (Italics original)

This explanation again reminds us of Article 15 [25], paragraph 1 (Breach consisting of a composite act), which refers to “the breach of an obligation by a State through a series of actions or omissions defined in aggregate as wrongful”. On the other hand, (narrowly defined) “continuing act” means an action or omission, attributable to a State, which proceeds unchanged over a given period of time. A typical example indicated in the commentary by the ILC is unlawful detention of a foreign official.⁷

To the extent that the wording “if it is continuing” is designed to cover not only a narrowly defined “continuing act” but also “composite act”, it is fair to say that the decision of the Drafting Committee was appropriate and reasonable. But what about *some* actions or omissions, which are attributable to a State but *not enough* to constitute a composite act? In such a case, one could only observe that each action or omission remains an “instantaneous act” or already completed continuing act, and consequently, it will be difficult to require the offending State to cease such acts because they are in any event already finished. In this situation, in the opinion of this writer, the counterpart State may require the author State not to repeat such action or omission again.⁸

Turning to the third point, implementation of the obligation, there is no doubt that, as we have seen above, a wrongdoing State must cease its illegal act if it is continuing, or must not repeat it if it is finished. But this is not because a new obligation is imposed on the wrongdoing

⁴ A/CN.4/SR.2662, p. 7.

⁵ A/CN.4/L.600*, p. 5. Article 28 of the first reading text was entitled “Responsibility of a State for an internationally wrongful act of another State”. *Yearbook of the ILC*, 1979, II-2, p. 94.

⁶ A/CN.4/507, p. 53 (para. 119). Article 41 of the Draft Articles at the first reading referred to “an internationally wrongful act having a continuing character”, that is, narrowly defined continuing act in Article 25, Paragraph 1 of the Draft Articles. See next note.

⁷ *Yearbook of the ILC*, 1978, II-2, p. 90.

State. The only thing required of a State here is to implement the original obligation, although it is being or has been breached. On the other hand, to demand assurances and guarantees of non-repetition, as provided in Article 30 (b), is slightly different from requiring that they not repeat the illegal act. In the former case, the State performing the wrongful act should do something new to ensure or guarantee the non-repetition.⁹ The same would hold true in regard to the coercing State under Article 18. To cease or not to repeat the coercing act would be a new obligation upon the coercing State because the coercing act, even if it constituted an illegal intervention toward the coerced State, was not in itself an act that violated an obligation owed to the injured State. Such differences should be reflected, in some way or other, in the formulation of Article 30.

The considerations made above lead us to the following tentative proposal on cessation and non-repetition of an internationally wrongful act:

Article 30 [41. 46] (Cessation and non-repetition)

1. *The State responsible for the internationally wrongful act,*
 - (a) *If it committed that act, should cease and should not repeat that act.*
 - (b) *If it coerced another State to commit that act under Article 18, is under an obligation to cease or not to repeat the coercing act towards that State.*¹⁰

⁸ In the *NATO* cases, with regard to a series of bombing attacks carried out by NATO member States, Yugoslavia insisted that these events had constituted "instantaneous wrongful acts" and there have been a number of separate disputes between the Parties. It follows that, according to Yugoslavia, the bombings after 25 April, the date of the signature of its declaration accepting the Court's jurisdiction, fall well within the Court's jurisdiction. It is interesting to note that Judge Shi, in his dissenting opinion, considered the aerial bombings to be a "continuing act", as provided in Article 25, paragraph 1 of the first reading Draft Articles on State Responsibility. Mention must also be made of the fact that Judges Koroma and Kreca, in their declaration and dissenting opinion, considered them a "composite act" under Article 25, paragraph 2. *International Legal Materials*, 1999, p.957 (para. 25), p.963 (Koroma), p.1006 (Kreca). p.1015 (Shi).

First, according to our observation, it would be difficult to consider them as a narrowly defined continuing act, as provided by Article 25, paragraph 1. Second, it may happen, on the contrary, that a series of bombings constitutes a composite act if they are regarded, for example, as aggression or genocide against the territory and the people of Yugoslavia. (It must be recalled in this vein that Judge *ad hoc* Lauterpacht, in his separate opinion to the Counter-claims Order in the *Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia)* case, indicated that: "13. ... A single murder or other horrific act cannot be genocide. Only a series or accumulation of such acts, if they reveal collectively the necessary intent and are directed against a group identifiable in the manner foreseen in Article II of the Convention, will serve to constitute genocide — whereupon liability for the individual component crimes, as well as for the special crime of genocide, will fall not only upon the individuals directly responsible but also upon the State to which their acts are attributable." Separate opinion of Judge *ad hoc* Lauterpacht, Counter-Claims Order, 17 December 1997.) Third, if the assumption of aggression or genocide does not stand, there will only remain the possibility of them being instantaneous acts, which fall short of being a composite act. In any event, a fundamental question is whether such characterization of the alleged illegal act(s) by NATO member States in terms of State responsibility is so closely related to the characterization of the dispute in terms of the Court's jurisdiction *ratione temporis*.

⁹ By way of example, in the *Bread* case before the International Court of Justice, Paraguay had requested the Court to adjudge and declare that the United States should, among other things, provide Paraguay a guarantee of non-repetition of the illegal act. (Provisional Measures Order, Case concerning the Vienna Convention on Consular Relations, 9 April 1998, para. 5.) The Government of the United States, in a statement on November 3, 1998, recognized that failure to notify Mr. Bread had unquestionably been a violation of an obligation owed to the Government of Paraguay under the Vienna Convention on Consular Relations, and went on to assure the Government of Paraguay of its effort to better educate officials throughout the United States of the consular notification requirements. (Statement released on behalf of the United States of America by the U.S. Embassy in Asuncion, Paraguay, on November 3, 1998.)

¹⁰ With regard to the Drafting Committee's Article 30 (b), assurances and guarantees of non-repetition, there will be further discussion below in Section VII, particularly in connection with serious breaches of essential obligations to the international community.

III. *Reparation*

In the Drafting Committee's text, seven articles are dedicated to the scope and forms of reparation.¹¹ Article 31 of Chapter I is a general provision on reparation, which includes an obligation, on the part of the responsible State, to make full reparation for the injury caused by the internationally wrongful act as well as the definition of the injury. Chapter II of the text, entitled "The forms of reparation", ranges from Article 35 to Article 40. Article 35 stipulates that full reparation for the injury shall take the form of restitution, compensation and satisfaction, either singly or in combination. Articles 36, 37 and 38 each constitute individual provisions on restitution, compensation and satisfaction respectively. In addition, new and separate articles on interest and contribution to the damage are inserted in the text as Articles 39 and 40.

Apart from the inclusion of the separate articles on interest and contribution to the damage, Article 31 of Chapter I as well as the articles in Chapter II of the Drafting Committee's text have four salient characteristics in comparison with its counterpart in the first reading text. First, these articles are expressed in terms of obligations of the responsible State, whereas the first reading text expressed the provisions on reparation in terms of rights of the injured States. Second, Article 31, paragraph 2 newly defines the injury for the purpose of full reparation as follows: "Injury consists of any damage, whether material or moral, arising in consequence of the internationally wrongful act of a State." Third, as already noted in the previous section, assurances and guarantees of non-repetition are no longer treated as a form of reparation. Fourth, the original article 45 on satisfaction suggested the possibility of such payment of moneys as nominal damages or damages reflecting the gravity of the infringement under the form of satisfaction, but this possibility is excluded in the new article 38.

Although these differences from the original text, if considered separately, might appear not so important as to be described as salient characteristics, their combined effect seems far-reaching. There can be no doubt that the wrongdoing State owes an obligation to make reparation and that damage constitutes a presupposition of the reparation. This confirmation immediately raises the following questions. First, whose and which damage is relevant to reparation in international law? Second, which form of reparation should correspond to which damage? Third, to whom must reparation be made?

With regard to the first question, any damage, whether material or moral, arising in consequence of the internationally wrongful act of a State is, according to Article 31, paragraph 2, considered to be relevant. This definition of damage is so broad as to include the following categories of damage: 1) material or moral damage suffered by a State, 2) material or moral damage suffered by individuals in cases of diplomatic protection, 3) material or moral damage suffered by individuals in cases of human rights violations by their national States, 4) material damage not allocatable to a particular State or individual as in the hypothetical case of dumping of radioactive waste in Antarctica. It must be remembered that the Draft Articles

¹¹ On the scope and forms of reparation, see the texts of Articles 31 and 35-40, A/CN.4/L600*, pp. 9-11; explanations on the articles by the Chairman of the Drafting Committee, Gaja, A/CN.4/SR.2662, pp. 8 and 10-19; relevant discussions in the ILC, A/55/10, pp. 25-6 (paras 78-9), 30-34 (92-102), 36-7 (111-2) and 48-73 (151-241); Crawford, third report on State responsibility, A/CN.4/507, pp. 10-21 (paras 17-43) and 54 (119), A/CN.4/507/Add.1, 15 June 2000, pp. 3-56 (paras 120-223).

at the first reading appears to cover only the first and second categories of damage.

In respect to the second question, it is evident that restitution must be made for material damage suffered by a State, if not materially impossible, in accordance with Article 36. It is also not difficult to ascertain that material or moral damage suffered by a State, in so far as it is financially assessable, shall be covered by compensation as provided for in Article 37. On the other hand, moral damage suffered by a State, if not financially assessable, will be made good by satisfaction, for example by a formal apology, under Article 38.

With regard to material or moral damage suffered by individuals in cases of diplomatic protection, it must be noted that, according to the commentary attached to Draft Article 8 of Part Two at the first reading, such damage would be construed as “material damage” suffered by the national State of the individual victims.¹² It is not certain whether the Drafting Committee would maintain this approach. But in any event, my contention here is that such damage must be treated in exactly the same way as the damage suffered by a State. In addition, the same also holds true with respect to the third category of damage as in the case of human rights violations. It follows that restitution must be made, if not materially impossible, for material damage suffered by an individual, whether in cases of diplomatic protection or human rights violations. Material or moral damage suffered by an individual, in so far as it is financially assessable, shall be covered by compensation as provided for in Article 37. On the other hand, moral damage suffered by an individual, if not financially assessable, will be made good by satisfaction, for example by a formal apology, as provided for in Article 38.¹³

The above considerations will necessarily lead us to the third question of to whom reparation must be made. In this regard, the first reading text was very clear in that reparation should be made to the injured *State*. It is only the injured State that was entitled to obtain restitution, compensation and satisfaction from the wrongdoing State. On the contrary, as already noted, the Drafting Committee’s articles on reparation stipulate the obligations of the wrongdoing State of making restitution, compensation and satisfaction. There is no mention in these articles as to whom the reparation should be made. The following article is, however, particularly pertinent to our discussion:

Article 34 (Scope of international obligations covered by this Part)

1. The obligations of responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending on the character and content of international obligation and on the circumstances of the breach, and irrespective of whether a State is the ultimate beneficiary of the obligation.
2. This Part is without prejudice to any right, arising from the international responsibility of a State, which accrues directly to any person or entity other than a State.¹⁴

In explaining the implications of Paragraph 1, the Chairman of the Drafting Committee stated that: “When an obligation of reparation existed toward a State, reparation was not

¹² *Yearbook of the ILC*, 1993, II-2, p. 71.

¹³ Regarding the fourth type of damage, restitution will be required as much as possible of the wrongdoing State. On the contrary, monetary compensation is not likely to occur in so far as general and inter-State regimes of international responsibility are concerned, if one considers to whom the compensation could be made.

¹⁴ Article 34, paragraph 1 is based on the proposal made by Gaja on Article 40 *bis*. See ILC(LII)WG/SR/CRD. 4, 17 May 2000. On the other hand, Paragraph 2 came from paragraph 3 of Article 40 *bis* suggested by the Special Rapporteur, Crawford, in his third report on State responsibility. A/CN.4/507, p. 55.

necessarily to that State's benefit. For instance, a State's responsibility of an obligation under a treaty concerning the protection of human rights might exist towards all the other parties to the treaty, but the individuals affected must be regarded as the ultimate beneficiaries and, in that sense, as the holders of the right to reparation.¹⁵ It must be noted that this statement referred to two distinct questions. One was "who is entitled to obtain, or has the secondary right to, reparation", which is precisely the matter at issue in this section. The other was "who is entitled to invoke, in the inter-State level, the responsibility of another State", which will be discussed in the next section.

As for the question at issue now, my suggestion is very simple: those who suffered relevant damage, whether they be a State or any person or entity other than a State, is entitled to obtain reparation from the responsible State. So it would follow that individuals may have a [secondary] right to reparation in international law. This consequence is, in my opinion, inescapable in so far as, for example, human rights treaties confer on individuals primary rights of international law to be protected in the jurisdiction of each contracting State. Having said this, it must be added that this secondary right of individuals is a substantive one. Thus, whether it could be accompanied by some procedural rights to make a claim for reparation before national courts or some international forum will depend on whether the relevant human rights treaty is considered to be self-executing or whether the treaty is equipped with such a forum and the concerning contracting State has accepted them. Needless to say, individuals have, by definition, no procedural rights for reparation at inter-State level. This will be discussed in the next Section.

In conclusion, I would argue that, in spite of the proposed Article 34, paragraph 2, the Draft Articles should explicitly refer to the recipients of reparation made by the responsible State.

Article 31 (Reparation)

1. *The responsible State is under an obligation to make full reparation for the damage caused by the internationally wrongful act to the beneficiary, may it be a State, or any person or entity other than a State, of the obligation breached.*
2. *The damage under Paragraph 1 consists of any damage to the beneficiary of the obligation breached, whether material or moral, arising in consequence of the internationally wrongful act of a State.*

IV. States Entitled to Invoke the Responsibility of Other States

Draft Article 40 as adopted at the first reading in 1985, and entitled "Meaning of injured State" as late as 1996, first defined "injured State" in paragraph 1 as any State a right of which was infringed by an illegal act of another State. Paragraphs 2 and 3 of the article then went on to categorize injured States according to three different criteria: sources of law, interests at stake, and results or influences of the illegal act. In the Drafting Committee's text, Article 43 and Article 49 constitute the counterpart.¹⁶

¹⁵ A/CN.4/SR.2662, p. 10.

¹⁶ The text of Articles 43 and 49, A/CN.4/L.600*, pp. 12, 13-14; explanations on the articles by the Chairman of the Drafting Committee, A/CN.4/SR.2662, pp. 21-25; relevant discussions in the ILC, A/55/10, pp. 37-48 (paras 114-150); Crawford, third report on State responsibility, A/CN.4/507, pp. 29-55 (paras 66-119).

Article 43 (The injured State)

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) That State individually; or
- (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
 - (i) Specially affects that State; or
 - (ii) Is of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned.

Article 49 (Invocation of responsibility by States other than the injured State)

1. Subject to paragraph 2, any State other than an injured State is entitled to invoke the responsibility of another State if:
 - (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest;
 - (b) The obligation breached is owed to the international community as a whole.

In comparing these articles with the original Article 40, one could discern the following differences. First, it is not certain, according to these articles, whether a State becomes entitled to invoke the responsibility of another State because its right has been infringed. Second, sources of international law as a criterion for categorizing injured States are abandoned. Third, the contrast between the individual interest of a State in Article 43 (a) and the collective interest of States in Article 49, paragraph 1 (a) is emphasized. Fourth, there remain references to results or influences of an illegal act, in Article 43 (b), in order to describe the situation where an internationally wrongful act simultaneously infringes an individual interest of a State and a collective interest of States including that State as in the case of aggression.¹⁷ As for the second and third points, I agree with the new formulations, as I have indicated on a previous occasion.¹⁸ With regard to the fourth, however, Article 43 (b) should be deleted because Article 43 (a) already covers the situations envisaged by it well.¹⁹

Turning to the first point, the Draft Articles at the first reading, while defining and categorizing “injured State” in Article 40, did not contain a separate provision on the entitlement of an (injured) State to invoke the responsibility of another State. One could only infer from several articles, subsequent to Article 40, on reparation and countermeasures that it was an injured State that was entitled to obtain reparation and, when necessary, to take countermeasures. In contrast, the Drafting Committee’s Articles 43, while constituting such an entitlement clause, refers to the notion of “injured State” without defining it. On the other hand, Article 49, paragraph 1, the other entitlement clause, seems odd in terms of classification. Here a distinction is first made between an injured State, which is entitled to invoke another State’s responsibility under Article 43, and any other States. Moreover, among any

¹⁷ Article 43 (b)(i) covers, by way of example, the target State of aggression. Article 43 (b)(ii), on the other hand, is intended to deal with the case in which every State was affected by the breach of such obligations as under a disarmament treaty. A/CN.4/SR.2662, p. 24.

¹⁸ Kawasaki, *The “injured State”...*, *cit.*, pp. 20-24.

¹⁹ In this sense, I support the second proposal by Simma presented at the Fifty-second session of the ILC, ILC (LII)/WG/SR/CRD.1/Rev.1, 16 May 2000. It is also reported that the same suggestion was made in the discussion in the ILC. A/55/10, p. 45(para. 139).

other States, a further differentiation is made between States entitled to invoke the responsibility of another State and totally indifferent third States. Thus, there would be two species, injured State and any other States under this classification, and two varieties in the latter. However, the expressions of Articles 43 and 49 unequivocally show us that we should first draw a distinction between States to which the obligation breached is owed and any other State. Among the former States, a further distinction will be drawn according to the nature of the interests at issue.

I would suggest, on the basis of these considerations, that the Draft Articles on State responsibility should contain three different categories of rules according to their objects. The first rule is concerned with to which States the obligation breached is owed, which is in principle a matter of interpretation of the relevant primary rule of international law. The second relates to the invocation of responsibility and taking of countermeasures, which is a matter of secondary rules of State responsibility. The third rule is a linkage clause between primary rules and secondary rules, stipulating which States are entitled to invoke responsibility and to take countermeasures. It must be added that this third category of rule also belongs to secondary rules of international law.

The second type of rules will be dealt with in the following sections. Our tentative formulations of the first and the third categories of rules are proposed below as *Article 15 bis*, *Article 15 ter* and *Article 43 bis*.

Part One (The international wrongful act of a State)

Chapter III (Breach of international obligation)

Article 15 bis (Scope of international obligation covered by this Chapter)

1. *International obligation breached by a State may be owed to another State, to several States, or to the international community as a whole, depending on the character and content of the obligation, and irrespective of whether a State is the ultimate beneficiary of the obligation.*
2. *Paragraph 1 is without prejudice to any right, arising from the international obligation, which accrues directly to any person or entity other than a State.*

Article 15 ter (Meaning of injured State)

1. *For the purpose of present articles, "injured State" means any State an obligation to which another State owed is breached by that latter State.*
2. *In particular, "injured State" means:*
 - (a) *If the obligation breached is owed to a State or States individually, that State or States.*
 - (b) *If the obligation breached is owed to a group of States or to the international community as a whole collectively, any State party of the group or any State.*

Part Two bis (The implementation of State responsibility)

Chapter I (Invocation of the State responsibility of a State)

Article 43 bis (State entitled to invoke the responsibility of another State)

1. *A State is entitled to invoke the responsibility of another State, if that State is considered to be an injured State under Article 15 ter.*
2. *Paragraph 1 is without prejudice to any right, arising from the international responsibility of a State, which accrues directly to any person or entity other than a State.*

These articles require further comment. The Draft Committee's Article 34 is trans-

planted, with necessary changes, in Chapter III of Part One, as *Article 15 bis*. Article 34, as we have already seen in the above section, is concerned with the secondary obligations of the responsible State as well as possible secondary rights of persons or entities other than States. Although I have no objection to the insertion of this kind of article in Part Two of the Draft Articles, I believe the same picture will be drawn with regard to primary obligations of States and possible primary rights of individuals. *Article 15 bis* is thus conceived as a necessary introduction to the following *Article 15 ter* on the notion of “injured State”. It is evident that Article 34 in itself, relating only to secondary rules, could not play such a role.

On the definition and categorization of “injured State”, I have already proposed a tentative draft in my previous article.²⁰ *Article 15 ter* is, on the whole, in line with it. What is new here is the placement of the article. It might be odd that no mention is made of some rights of a State, while reference is made to “any right which accrues directly to any person or entity other than State”. But this is only because we are merely adopting the way of formulation of articles by the Drafting Committee. I still believe that, in so far as the general and inter-State legal order is concerned, to each and every obligation corresponds a right of at least one other State. So “injured State” is nothing but a State whose primary right is infringed. It would follow that, if an obligation for the protection of a collective interest of States is breached, the collective right of the States is infringed.²¹ *Article 15 ter, paragraph 2 (b)* covers this situation.²²

It must also be added that this statement is not necessarily contrary to the recognition of rights of individuals in international law. Taking an example of a violation of a human rights treaty by a State, what we are seeing here is that both substantive collective right of States and substantive rights of individuals are infringed side by side. From the procedural point of view, the former right may be exercised by States before some international bodies or at inter-State level,²³ which will be discussed below.

V. Invocation of the responsibility of a State

The newly proposed Part Two *bis*, entitled “The implementation of State responsibility”, contains two chapters. Chapter I deals with “Invocation of the State responsibility of a State”,

²⁰ Kawasaki, The “injured State” ..., *cit.*, p. 23.

²¹ The Special Rapporteur Crawford, in his *Article 40 bis*, initially made a distinction between legal rights and legal interests, following the argument by the ICJ in the *Barcelona Traction* case. Crawford, Third report on State responsibility, A/CN.4/507, p. 54. (See also, Crawford, The Standings of States: A Critique of Article 40 of the ILC's Draft Articles on State Responsibility, in Andenas/Fairgrieve (eds.), *Judicial Review in International Perspective: Liber Amicorum in honour of Lord Slynn of Hadley*, 2000, pp. 41-42.) However, the Drafting Committee has avoided this distinction since all right-infringed States must also have a legal interest. A/CN.4/SR.2662, p. 23. It must be recalled, in this context, that the ICJ, in the *South West Africa* (preliminary objections) cases in 1962, used these words interchangeably: “the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandatory Territory, and toward the League of Nations and its Members.” *ICJ Reports 1962*, p. 343. In addition, in the *South West Africa* (second phase) cases in 1966, the Court, although in the context of *arguendo*, referred to the notion of “collective rights [of Member States] in respect of League matters”. *ICJ Reports 1966*, p. 30 (para. 36).

²² Hereinafter, I will employ in this paper the traditional terms of “directly injured State” and “not directly injured States”, referring to the injured State in the meaning of *Article 15 ter, paragraph 2 (a)*, and the injured States in the meaning of *Article 15 ter, paragraph 2 (b)* respectively. For a more detailed explanation of this distinction, see Kawasaki, The “injured State” ..., *cit.*, p. 22.

²³ The latter was discussed in the above section.

and Chapter II with “Countermeasures”. Chapter I consists of seven articles, which will be classified into three groups. First, as we have just seen above, Article 43 and Article 49, paragraph 1 provide who is entitled to invoke the responsibility of another State. Second, Article 44 and Article 49, paragraph 2 stipulate what kind of conduct the entitled State may demand the responsible State accomplish. Third, the remaining articles and paragraphs set several conditions as to the invocation of responsibility by the entitled State. In this section we will examine the second category of articles.²⁴

Article 44 (Invocation of responsibility by an injured State)

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
2. The injured State may specify in particular;
 - (a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
 - (b) What form reparation should take.

Article 49 (Invocation of responsibility by States other than the injured State)

2. A State entitled to invoke responsibility under paragraph 1 may seek from the responsible State:
 - (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30 [41, 46];
 - (b) Compliance with the obligation of reparation under Chapter II of Part Two, in the interest of the injured State or of the beneficiaries of the obligation breached.

Although it is clear that Article 44 is concerned with directly injured States and Article 49 with not directly injured States, these articles are apparently uneven in terms of object of stipulation. In short, Article 44 is much more procedural than Article 49. Without prejudice to the necessity of an article for such procedural aspects as provided in Article 44, I will suggest, in line with the expression of Article 49, a single article on invocation of responsibility by directly injured States as well as by not directly injured States.

Article 44 bis (Invocation of the responsibility of a State)

A State entitled to invoke responsibility under Article 43 bis may seek from the responsible State:

- (a) Cessation and non-repetition of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30 [41, 46];*
- (b) Compliance with the obligation of reparation under Chapter II of Part Two, in the interest of the beneficiaries of the obligation.*

As for the *subparagraph (a)*, a slight change is introduced in consonance with my arguments in Section II. With regard to the *subparagraph (b)*, it must be noted that no reference is made to the question of to whom reparation must be made. As we have seen in Section III, this is a matter of content or constituent element of secondary obligation of

²⁴ The text of Articles 44 and 49, paragraph 2, A/CN.4/L.600*, pp. 12-3; explanations on the articles by the Chairman of the Drafting Committee, A/CN.4/SR.2662, pp. 25-6, 28-9; relevant discussions in the ILC, A/55/10, pp. 73-4 (paras 242-246), 78-82 (255-267), 104-107 (346-354); Crawford, third report on State responsibility, A/CN.4/507, p. 52 (Table 2). A/CN.4/507/Add.2, pp.3-19 (paras 227-262), 30 (284). A/CN.4/507/Add.4, pp.3-12 (368-385).

reparation. The phrase of “in the interest of the beneficiaries of the obligation” is intended to cover all possible situations.²⁵

VI. *States Entitled to Take Countermeasures Against Other States*

Chapter II of Part Two, entitled “Countermeasures” and comprising six articles, deals with the object of countermeasures as well as conditions and limitations to be imposed on taking countermeasures. The Draft Articles at the first reading, while defining the taking of countermeasures in Article 47, paragraph 1, lacked, strangely enough, a provision on the entitlement to take countermeasures. The Drafting Committee’s text succeeds in incorporating it in such clauses as Article 50, paragraph 1 and Article 54, paragraphs 1 and 2.²⁶

Article 50 (Object and limits of countermeasures)

1. A injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.

Article 54 (Countermeasures by States other than the injured State)

1. Any State entitled under article 49, paragraph 1 to invoke the responsibility of a State may take countermeasures at the request and on behalf of any State injured by the breach, to the extent that that State may itself take countermeasures under this Chapter.
2. In the cases referred to in article 41 [i.e. serious breaches of obligations owed to the international community as a whole that are essential for the protection of its fundamental interests], any State may take countermeasures, in accordance with the present Chapter in the interest of the beneficiaries of the obligation breached.

It is apparent that Article 50 deals with countermeasures by a directly injured State, while Article 54 is concerned with countermeasures by not directly injured States. As a matter of drafting policy, here again, a unitary treatment of both cases in a single article will be recommended in terms of classification. This is because, as in the case of invocation of responsibility, the reason why a State is entitled to take countermeasures against a wrongdoing

²⁵ The reason why the original article on the invocation of responsibility of a State by not directly injured States may also apply to the invocation by directly injured States is as follows: In the first place, where material or moral damage to a State is at issue, the State, as the beneficiary of the obligation under *Article 44 bis (b)* of my proposal, may seek to obtain reparation from the responsible State. On the other hand, the regime of diplomatic protection consists of two distinct stages. In the first stage, the national State may induce, again under *Article 44 bis (b)*, the responsible State to make reparation to the individual victims, i.e. the beneficiaries of the obligation. If the responsible State failed to do so, then in the second stage, the national State may seek to obtain compensation from the responsible State. This second stage of diplomatic protection constitutes, in the opinion of this writer, a sub-system of State responsibility in the sense that the compensation is made not to the beneficiaries of the obligation. It must be added that this sub-system of diplomatic protection is of general customary international law. On this topic, see below note 29.

²⁶ The text of Articles 50 and 54, A/CN.4/L.600*, pp. 14-15; explanations on the articles by the Chairman of the Drafting Committee, A/CN.4/SR.2662, pp. 29-31, 37-9; relevant discussions in the ILC, A/55/10, pp. 87-90 (paras 290-298), 95-98 (307-319), 103 (338-341), 107-8 (355-357), 112-5 (364-373) 118 (385-6); Crawford, third report on State responsibility, A/CN.4/507/Add.3, pp. 2-7 (paras 285-297), 18-23 (320-333), 36 (367). A/CN.4/507/Add.4, pp. 12-21 (paras 386-406), 24-5 (413).

State derives from the fact that the obligation it is owed is breached. It must be said that, in terms of this fact, directly injured States and not directly injured States are on the same footing. Having said this, contrary to the case of invocation of responsibility, there might be some qualifications on the entitlement of taking countermeasures by not directly injured States. In this respect, it will be necessary to take a close look at Article 54.

With regard to countermeasures taken by not directly injured States, Article 54, paragraphs 1 and 2, read together with the explanation by the Drafting Committee's Chairman,²⁷ shows us the following four implications. First, not directly injured States may take countermeasures against the responsible State if there is at the same time a directly injured State in the meaning of Article 43 (b) and that State makes a request to them that they take such countermeasures. Second, it would follow that, if no directly injured State is found, not directly injured States could not take any countermeasures against the responsible State. Third, in spite of this, in the case of a serious breach of an obligation owed to the international community as a whole that is essential for the protection of its fundamental interests, not directly injured States may take countermeasures against the responsible State, even if there is no directly injured State within the meaning of Article 43 (b). Fourth, in the foregoing case of serious breaches of community obligations, even when there exists a directly injured State, the request by that State does not necessarily constitute a prerequisite for not directly injured States to take countermeasures against the responsible State.

We all know that the topic of countermeasures by not directly injured States has been one of the most difficult problems in the codification effort of the law of international responsibility of States in the ILC. With regard to this subject, on the one hand, one could not totally deny the possibility of not directly injured States taking countermeasures because this might raise the objection that an international obligation not supported by possible countermeasures is not so much a rigid legal obligation as belonging to soft law. On the other hand, however, it does not appear realistic to recognize this possibility in any instance, especially in the case of minor or immaterial breaches of obligations protecting the collective interests of States. If that were the case, it might lead the international legal system to disorder. Against this background, the efforts made by the Drafting Committee as well as the Special Rapporteur to overcome this dilemma are laudable.

Nevertheless, returning to the implications raised by Article 54, it must be said that, while willing to accept the remaining suggestions, I remain unconvinced by the second implication. I agree that a single and minor breach of an obligation aimed at protecting a collective interest of States may not entitle these States to take countermeasures against an illegal State. I also welcome the fact that Article 54, paragraph 2 recognizes the countermeasures by not directly injured States in the case of serious breaches of obligations owed to the international community as a whole that are essential for the protection of its fundamental interests. However, in between these two extremes, there seems to be a third situation, where a serious breach of a collective obligation in an international treaty occurs, but this breach does not amount to the serious breach of essential obligations to the international community, as envisaged in Article 41. Under the construction of Article 54, not directly injured (contracting party) States could not take countermeasures against the responsible State. However, I would argue that, in such a situation, there is room for these States to take countermeasures against

²⁷ A/CN.4/SR.2662, pp. 37-8.

that State.

By way of example, one can cite Article XII, paragraph 3 of the Chemical Weapons Convention, which provides: "In cases where serious damage to the object and purpose of this Convention may result from activities prohibited under this Convention, in particular by Article I, the Conference may recommend collective measures to States Parties in conformity with international law." It is commonly understood that "collective measures in conformity with international law" may include countermeasures in the international law of State responsibility.²⁸ One might say that this is not a case of general regime of State responsibility because this treaty regime rather constitutes a sub-system of State responsibility as envisaged in Article 56 [37].²⁹ I agree with this argument to the extent that the collective decision by the treaty Conference is concerned. With regard to the collective *measures* taken by the contracting States, I would argue that the article has only a declaratory effect in the sense that the States Parties potentially have an ability to take such measures in such cases of serious breaches of treaty obligations.

These considerations, together with the suggestions made in the previous sections, lead us to the following proposal:

Article 50 bis (State entitled to take countermeasures against another State)

1. *If a State is considered to be an injured State under Article 15 ter, paragraph 2 (a), that State may take countermeasures against a State which is responsible for an internationally wrongful act.*
2. *If a State is considered to be an injured State under Article 15 ter, paragraph 2 (b), that State may take countermeasures against a State responsible for an internationally wrongful act that constitutes a serious breach of an obligation owed to the group of States including that State or to the international community as a whole.*
3. *A breach of an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation, risking substantial harm to the interests protected thereby.*³⁰

²⁸ It is reported that the partial interruption of economic relations or putting of bank accounts under sequester can be within the range of measures considered by the Conference. Krutzsch/Trapp, *A Commentary on the Chemical Weapons Convention*, 1994, pp. 225-6.

²⁹ Article 56 [37] provides: "These articles do not apply where and to the extent that the conditions for existence of an internationally wrongful act or its legal consequences are determined by special rules of international law." The phrase of "the conditions for existence of an internationally wrongful act" has now been inserted to make this article applicable to Part One. The title "*Lex specialis*" and the expression "special rules of international law" may give the impression that general customary rules of international law would not produce such effect, but this is not true. The original Article 2 of Part Two was adopted on its first reading by the ILC in 1983. In the 1996 session, the ILC not only renumbered it as Article 37, but also changed some phrases in it and attached the title. The expression of "special rules of international law" has been adopted by the Drafting Committee in 2000. The counterpart in the original article provided: "... those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question". The present writer is inclined to accept the original idea, admittedly not so sophisticated, in order to avoid this misconception.

³⁰ This paragraph is based on Article 41, paragraph 2, of the Drafting Committee's proposals.

VII. *Serious Breaches of Essential Obligations to the International Community*

Chapter III of Part Two is entitled “Serious breaches of essential obligations to the international community”, and consists of two articles, Articles 41 and 42.³¹ The counterpart in the Draft Articles on first reading was Chapter IV of Part Two, entitled “International crimes”, as well as the well-known Article 19 of Part One. The Drafting Committee’s text contains three major modifications to the first reading text.

First, the original Article 19, paragraph 2 is transposed into the new text, as Article 41, in which, however, no mention is made of “international crimes of State”. In addition, its paragraph 2 newly provides the definition of a “serious breach” of an obligation. Second, with regard to reparation in case of serious breaches of community obligations, Article 52 at the first reading, putting aside in such case some of the limitations and restrictions set out with regard to restitution and satisfaction, was deleted. Instead, Article 42, paragraph 1 stipulates that a serious breach of a community obligation may involve, for the responsible State, damages reflecting the gravity of the breach. Third, Article 42, paragraph 3 refers to the possibility of the development in the future of further consequences that may be entailed upon such breaches.

As I have already discussed “international crimes of State” to some extent in my previous paper,³² it will be adequate here to make only two comments on this topic. First, “damages reflecting the gravity of the breach” as proposed in Article 42, paragraph 1, even if they stand in themselves, do not appear to be an adequate consequence to be referred to in this context. It must be recalled that Article 45, paragraph 2 (c) at the first reading considered “damages reflecting the gravity of the infringement” as one form of satisfaction, and that the ILC’s commentary thereto referred to the damages ordered by the Secretary General of the United Nations in the *Rainbow Warrior* case as an example.³³ It is no doubt that the sinking of the *Rainbow Warrior* in Auckland harbour by agents of the French security service did constitute serious breaches of international obligations owed not only to New Zealand but also to the United Kingdom, as the flag State of the ship, and to the Netherlands, as the national State of the victim killed on board the ship. But in this case, the obligations breached were owed not so much to the international community as a whole, as envisaged in Chapter III, but to the particular States. It would follow that such damages may be awarded irrespective of whether the obligation at issue is owed to the international community as a whole or not.

Our second observation relates to a possible *additional* (i.e. not envisaged in the normal case of internationally wrongful acts) consequence of such serious breaches of international community obligations. I believe that serious breaches of essential obligations to the international community, such as aggression and genocide, may only occur with the total and intentional commitment of the government of the responsible State. It would follow that it must be required that the responsible State change, from the bottom up, its structure of

³¹ The text of Articles 41 and 42, A/CN.4/L.600*, p. 11; explanations on the articles by the Chairman of the Drafting Committee, A/CN.4/SR.2662, pp. 19-21; relevant discussions in the ILC, A/55/10, pp. 109-110 (para 358), 115-117 (374-383), 118-9 (388-9); Crawford, Third report on State responsibility, A/CN.4/507/Add.4, pp. 21-24 (paras 407-412).

³² Kawasaki, *Crimes of State in International Law*, *Shudo Law Review*, Vol.15 No.2, 1993, pp. 27-45.

³³ *Yearbook of the ILC*, 1993, II-2, pp. 79-80.

responsible government in order not to repeat such violation again. It would not be enough for the responsible State merely to cease the wrongful act and pledge not to repeat it. And this must be an *additional* consequence of the serious breaches of essential obligations to the international community.

Article 30 (Cessation and non-repetition)

2. *The State responsible for the internationally wrongful act is under an obligation:*
 - (a) *To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.*
 - (b) *To change radically the responsible government structure as appropriate assurances and guarantees of non-repetition, because the circumstances so require, if an international responsibility arises from an internationally wrongful act that constitutes a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests.*

VIII. Conclusions

We have examined some basic issues contained in Part Two and Part Two *bis* of the Draft Articles on State responsibility proposed by the Drafting Committee of the ILC in 2000. Our attention has been particularly directed to the question of who is entitled to invoke the responsibility of, and, where necessary, to take countermeasures against, the wrongful State. On this topic, many writers, including the present writer, have emphasized that a contrast must be drawn between directly injured State and not directly injured States for the purpose of reparation and countermeasures. The conclusion reached in this essay is, however, a rather surprising one: the difference might not be as great as expected.

First, with regard to the cessation and non-repetition of internationally wrongful acts, even under the Drafting Committee's proposal, both categories of injured State may equally seek from the responsible State cessation of the internationally wrongful act, and assurances and guarantees of non-repetition. Second, in respect of reparation, *Article 44 bis (b)* of my proposal suggests a unitary regime of reparation for both types of injured State: an injured State may induce the responsible State to comply with the obligation of reparation in the interest of the beneficiaries of the obligation. Third, the only difference between the two categories of injured State will be found in the regime of countermeasures, where not directly injured States may take countermeasures against the wrongful State only in the case of a serious breach of the relevant collective obligation. But even in this case, if one asks whether a directly injured State may take countermeasures in the case of a minor breach of an obligation owed it by another State, the difference might not be as wide because there may be room for discussion to the effect that countermeasures by a directly injured State should also be limited to the case of a serious breach of obligations.