

## THE ILC ARTICLES ON STATE RESPONSIBILITY: BETWEEN SELF-HELP AND SOLIDARITY

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### I. INTRODUCTION

International law is frequently distinguished by its lack of enforceability. As Martti Koskenniemi has observed, “[t]his aspect had always made the distance between domestic and international law seem greatest.”<sup>1</sup> To remedy this weakness, when proposing that the International Law Commission (ILC) undertake the project of State responsibility a half a century ago, Sir Hersch Lauterpacht viewed the treatment of breaches as a kind of ersatz criminal law. State responsibility, therein, was to solidify international law with an element of law-ness that was notably lacking during the inter-war period.<sup>2</sup> This general approach was systematized by *Special Rapporteur* Roberto Ago in his 1969 ILC Report.<sup>3</sup> There, he distinguishes between primary and secondary norms, i.e., between the obligations themselves and the consequences of breaching any such primary obligation. State responsibility falls into the latter category. As such, this dichotomy emphasizes that the State responsibility project is the international law equivalent of domestic sanctions (later called countermeasures). In 1998, by the time the ILC appointed James Crawford as the final *Special Rapporteur* of the project, the principle function of the ILC’s Articles on the Responsibility of States for Interna-

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1. Martti Koskenniemi, *Solidarity Measures: State Responsibility as a New International Order?*, 72 BRIT. Y.B. INT’L L. 337 (2002) [hereinafter Koskenniemi, *Solidarity Measures*].

2. *Id.* at 337-38. Cf. Glanville L. Williams, *International Law and the Controversy Concerning the Word “Law,”* 22 BRIT. Y.B. INT’L L. 146 (1945).

3. Int’l Law Comm’n [ILC], *Report of the International Law Commission on the work of its twenty-first session, 2 June – 8 August 1969*, ¶¶ 80-81, U.N. Doc. A/CN.4/220 (1969).

tionally Wrongful Acts<sup>4</sup> was to provide for the enforcement of international obligations.<sup>5</sup>

*The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* ("ILC Articles")<sup>6</sup> is the product of over five decades of ILC work and the ILC's most ambitious venture since the Vienna Convention on the Law of Treaties of 1969 (Vienna Convention).<sup>7</sup> The State responsibility project sought to ensure the bindingness of international law—in other words, to provide for its enforcement without an international policing force. To this end, the book is a work of international law professionalism at its finest and is among the greatest single contributions to the field in the history of State responsibility. That said, the ILC's omission of a democracy discourse in its final draft of the Articles seems odd. Contemporary international practitioners regularly invoke issues such as governance and legitimacy—issues that are likely to have effects on the validity and scope of countermeasures in practice. Yet, the final draft of the ILC Articles is silent on this matter. Below, I will assess the wisdom (and feasibility) of such a discourse.

The book has three sections: a 50-page Introduction; the text of the ILC Articles; and an extensive Commentary elaborating each provision. Below, in Part II of this paper, I consider the Introduction and Commentary to the ILC Articles in the book. In Part III, I will discuss why the ILC introduces the instrument of "countermeasures" as its best solution to the perpetual problem of international law enforcement. In Part IV, I substantively assess the Project using the lens of democracy. Finally, in Part V, I recapitulate this review and offer an overall opinion on the ILC's final product on State responsibility.

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4. See THE INTERNATIONAL LAW COMMISSION, ARTICLES ON STATE RESPONSIBILITY, reprinted in THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES, at 61 (James Crawford ed., Cambridge Univ. Press 2002) (2001); see also U.N. GAOR, Int'l L. Comm'n., *Fourth Report on State Responsibility*, U.N. Doc. A/CN.4/517 (Apr. 2, 2001). The ILC Articles (and other State responsibility documents) are available online at [www.stateresponsibility.com](http://www.stateresponsibility.com) (last visited 06 August 2006).

5. Koskeniemi, *Solidarity Measures*, supra note 1, at 339.

6. Crawford, supra note 4, at 61.

7. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

## II. OVERVIEW

In his Introduction, *Special Rapporteur* Crawford discusses the *acquis* of the final push to codify State responsibility. He begins with a narrative of the ILC's treatment of State responsibility from the first *Special Rapporteur*, F.V. García-Amador (Cuba). Crawford analyzes the development of those articles that ultimately comprise the final draft. The account is as selective as it is honest—leaving out those areas of State responsibility that were not seriously debated by the ILC<sup>8</sup> and bluntly criticizing *Special Rapporteurs* for their failures.<sup>9</sup> Crawford openly discusses the main problems that the ILC faced—including State crimes and the invocation of responsibility by non-injured States, the correlation of the law of treaty obligations to the responsibility for their violation. In sum, the Introduction is a concise narrative of the ILC's fifty-year effort to codify State responsibility, culminating in Crawford's final draft, which focuses on solidarity.

The Commentary is updated with language from recent ICJ decisions and arbitral awards. This section also takes account of relevant trends and legal developments.<sup>10</sup> For example, it cites heavily from the caselaw of the World Trade Organization and frequently refers to decisions of the International Criminal Tribunal for the Former Republic of Yugoslavia (ICTY).<sup>11</sup> As a reference book, the Commentary is satisfyingly detailed. It notes expressly what was included (e.g., continuing violations, circumstances precluding wrongfulness), what was excluded (e.g., State crimes) and what was not finalized (e.g., issues of admissibility, countermeasures).<sup>12</sup> But the greatest compliment one can pay the Commentary is that it is extremely clear. The ILC succeeds in making one of the most complicated topics in the field of international law read-

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8. For a critical view, see Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L. J. 1, 2 (1988) ("The sad story of the Commission's work on state responsibility is an exceptionally instructive case study in the sociology of contemporary international law.").

9. Crawford, *supra* note 4, at 2-4 (discussing items on the agenda during each Special Rapporteurs service that were not selected). **R**

10. That is, of course, until but not including the attacks of 9/11 and their aftermath.

11. More so than its cousin the ICTR, in Arusha.

12. Crawford, *supra* note 4, at 283, ¶ 8. **R**

ily comprehensible to the non-specialist.<sup>13</sup> While space does not permit an entire assessment of the ILC work here, I will examine the most controversial feature of the work’s final draft: countermeasures.

III. CODIFYING COUNTERMEASURES

A. *The Solution*

Countermeasures are the otherwise illegal actions that a wronged State may take in order to enforce its international right against an international violator.<sup>14</sup> The traditional view regarding countermeasures was famously portrayed by D. N. Hutchinson in the late 1980s. When an international breach occurs, one (or very few) States injured by the breach will have an enforceable secondary remedy to resort to self-help. Because of the relative helplessness of many States, “[p]ressure has long been felt to broaden the number of States which are entitled to react to breaches of multilateral treaties . . . in the name of solidarity.”<sup>15</sup> Hence the Draft Article’s inherent catch-22: maximum enforcement and minimal vigilantism.<sup>16</sup> While some norms (e.g., the prohibition of genocide) must be enforced notwithstanding “national interests” (e.g., prioritizing oil prices), is not the Charter of the United Nations (the

13. Herein arguably also lies its danger: by simplifying such a complex field to a misleading degree, the ILC (and most notably Ago) has created a shortcut for international lawyers to ‘apply’ to all reactions of international wrongs. Indeed, International Law Commissioner Martti Koskenniemi has described the ILC’s earlier attempt to codify countermeasures as a “thick maze of fine distinctions and hierarchies from the less to increasingly more controversial cases.” Koskenniemi, *Solidarity Measures*, *supra* note 1, at 341. Historically, the field of State responsibility has been more of an ad hoc and contextual one. See Alan Nissel, *The Creation of State Responsibility (1873-1969)* (forthcoming Dec. 2007) (unpublished LL.D. dissertation, University of Helsinki) (on file with author).

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14. Crawford, *supra* note 4, at 168 (Countermeasures in respect of an internationally wrongful act) (“The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.”).

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15. D. N. Hutchinson, *Solidarity and Breaches of Multilateral Treaties*, 59 BRIT. Y.B. INT’L L. 151, 156 (1989).

16. Andrea Gattini, *A Return Ticket to ‘Communitarisme’, Please*, 13 EUR. J. INT’L L. 1181, 1192-94 (2002).

Charter) the final word on the prohibition of forceful intervention?<sup>17</sup>

In the proposed ILC regime, those who invoke the right of countermeasures will primarily be injured States. Consequently, each State is left to fend for itself, each according to its own ability and interest. The 1994 genocide in Rwanda remains a dramatic demonstration of this systemic weakness. While some tragedies have united international forces to intervene on behalf of (white) victims, as in the cases of Kosovo in 1998 and Afghanistan in 2001, is this ad hoc approach the best possible solution?

In order to avoid a weak enforcement mechanism in the ILC Articles, *Special Rapporteur* Crawford instituted a general right of solidarity—the right of *any* State to invoke the responsibility of another State for certain violations and to take mea-

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17. Especially considering UN Secretary-General Kofi Annan's recently released report, we find that an inevitable confusion between primary and secondary rules in the ILC's Draft is the preclusion of the use of force when taking countermeasures. The Secretary-General, *In larger freedom: towards development, security and human rights for all*, ¶¶ 122-25, U.N. Doc. A/59/2005 (Mar. 21, 2005); see also Gattini, *supra* note 16, at 1194 ("The issue was not openly discussed in the ILC, but was clearly present in the mind of its members . . ."). Of course the transposition to international is anything but easy. In domestic law, rules are upheld by the authorized use of force (mainly by the police); the law is maintained by force. In contrast, the greatest justification for international law is the prohibition of the use of force. Article 2(4) of the UN Charter is largely seen as its most important provision. See, e.g., THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 2-5 (2002), for a statement that the Charter is aimed at prohibiting the unilateral use of force and replacing it with a system of collective security. The ILC Articles preclude recourse to the most obvious compliance tool: recourse to force in Article 50(1). Crawford, *supra* note 4, at 71 ("Countermeasures shall not affect: the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations . . .").

This overlap is beyond the scope of the paper, which focuses on the main issue in debate concerning the right of solidarity (not recourse to force) and how democracy will make a difference to the debate. We should note that the preclusion of force for countermeasures according to customary international law is not clear. The newly enacted Constitutive Act of the African Union, in Article 4(h) allows for the "right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity" in apparent contradiction to Article 2(4) of the Charter. Constitutive Act of the African Union art. 4, July 11, 2000, available at [http://www.au2002.gov.za/docs/key\\_oau/au\\_act.htm](http://www.au2002.gov.za/docs/key_oau/au_act.htm).

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asures against that State to ensure cessation of the breach and reparation. But, inescapably, this right is a politically charged one. In international law, as Professor Spinedi notes, there is an “opposition between a bilateralist conception of the obligations contained in treaties and a solidaristic conception of these obligations.”<sup>18</sup> This tension is easily seen in the ILC Articles. Article 54 (Measures taken by States other than an injured State) “does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State . . . .”<sup>19</sup> Article 48 (Invocation of responsibility by a State other than an injured State) allows non-injured States to invoke a State’s responsibility 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; or the obligation breached is owed to the international community as a whole.” The bilateralism of the first half of the provision, Article 48(1)(a), was not controversial and corresponded well with Article 60 of the Vienna Convention.<sup>20</sup> However, Article 48(1)(b) was based on the dictum from *Barcelona Traction*; there, regarding breaches of obligations *erga omnes*, the World Court states, *de novo*,<sup>21</sup> that all States can be held to have a legal interest.<sup>22</sup> But how does a non-injured

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18. Marina Spinedi, *From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility*, 13 EUR. J. INT’L L. 1099, 1106 (2002).

19. For an historical introduction on the political ideologies of solidarity and of solidarism in international law, see MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* 284-91 (2002).

20. Special Rapporteur Riphagen referred these “genuinely multilateral agreements” as “objective regimes.” Bruno Simma, *Bilateralism and Community Interest in the Law of State Responsibility*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY* 829, 830 (Yoram Dinstein & Mala Tabory eds., 1989).

21. Andreas L. Paulus, *Book Review*, 10 Eur. J. Int’l L. 810 (1999) (reviewing ANDRÉ DE HOOGH, *OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES* (1996) and MAURIZIO RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* (1997)) (“Almost 30 years after the International Court of Justice more or less ‘created’ the category of ‘obligations *erga omnes*’ in its famous *obiter dictum* in the *Barcelona Traction* judgment, the existence, meaning and impact of obligations ‘towards the international community as a whole’ are still the subject of heated dispute and controversy.”).

22. *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

State actually invoke Article 48(1)(b) without the ILC's guidance? What is the scope of a countermeasure to a breach against the international community as a whole? Should the reaction, for example, be more or less aggressive than a countermeasure to a violation of an obligation owed to a closed group of States?

### B. *The Problem*

If the ILC Articles were entirely composed of secondary norms—that is, devoid of normative content—then we could understand their lack of legitimacy discourse (since it would occur at the level of interpreting the primary obligation in question). But Article 50 (Obligations not affected by countermeasures), like other provisions of the ILC Articles, consists of additional primary norms without any legitimacy discourse.<sup>23</sup> By ignoring any normative content, the ILC seems to have sneaked a few primary norms into its work with the hope that no one would notice. To be sure, the ILC Articles do more than restate previously established law. Crawford writes candidly in Comment 12 that the work is a “progressive development” of international law. We are, thus, left to assess the practical ramifications of this methodology for State responsibility in general and with regard to countermeasures in particular.

*Special Rapporteur* Crawford's decision to introduce this right of solidarity is an understandable attempt to compromise between the controversy surrounding the creation of international crimes of state and the undisputed need to establish better international enforcement. However, by bypassing a legitimacy discourse, the ILC's codification leaves unanswered one of the main questions of State responsibility: What is the appropriate mechanism for taking countermeasures? The ILC Articles leave us with a concept of obligations concerning the international community as a whole. Yet, even understanding the phrase “international community,” “involves a prior redefinition of the community itself—who are ‘we’ as subjects of se-

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23. Indeed, before he became the *Special Rapporteur*, Professor Crawford stated that the “first principle” of establishing a satisfactory regime for the settlement of disputes is to restrict the scope of reprisals. James Crawford, *Counter-measures as Interim Measures*, 5 EUR. J. INT'L L. 65, 66 (1994).

curity.”<sup>24</sup> Lacking a legitimacy discourse in the ILC Articles, one could reasonably characterize Article 43 as a consent-based norm and Articles 40 and 48 as simply result-oriented provisions masked in “communitarian” garb.<sup>25</sup>

The ILC has struggled with the problem of balancing enforcement and legitimacy before. The final draft of Article 54 in 2001 is recognizably different from its 2000 predecessor. The latter was more clearly about enforcement (i.e., result-oriented). The 2000 draft entitled third-party States to take solidarity measures on two occasions: when an injured State makes a request or (when there is no such injured State) by *any State* “in order to ensure the cessation of the breach and reparation in the interests of the victims.”<sup>26</sup> Traditionally, this is explained by the claim that in the context of the aftermath of a series of global atrocities in the 1990s, the ILC veered from unilateral codification to multilateral system maintenance.<sup>27</sup> The effort to infuse the ILC Articles with solidarity measures was the most controversial aspect of the Third Reading of the ILC Articles.<sup>28</sup> Many governments believed that the provision would be destabilizing (e.g., Israel) or unduly restrictive (e.g., the United States and United Kingdom). After receiving feedback from various foreign ministries, the ILC deemed State practice of solidarity countermeasures to be “limited and embryonic.”<sup>29</sup> Three options remained: deletion, total retention, or limited retention. The ILC selected the third option<sup>30</sup> and in 2001, the final Article 54 “came about as a last-ditch compromise so as to (apparently) allow everyone to maintain their earlier position.”<sup>31</sup> Is the 2001 draft an improvement from its predecessor? On the one

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24. Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455, 472 (1996).

25. I am indebted to Professor Joseph Weiler for noting this observation.

26. See U.N. GAOR, Int'l L. Comm'n., *Third Report on State Responsibility*, ¶¶ 401-06, U.N. Doc. A/CN.4/507/Add.4 (Aug. 4, 2000); see *id.* ¶ 413 (for text of draft Articles 50A and 50B).

27. Koskenniemi, *Solidarity Measures*, *supra* note 1, at 340.

28. Crawford, *supra* note 4, at 48.

29. *Id.* at 56; see also *id.* at 302, ¶ 3.

30. *Id.* at 49.

31. As will be discussed below, Professor Koskenniemi argues “that whatever substantive view one may have about solidarity measure, leaving them uncodified provides the best result inasmuch as only that approach takes account of the significant difference between the international and the



hand, the new draft leaves in place the tensions of the 2000 draft. The ILC seems satisfied in grounding the State responsibility upon “secondary” rules as they correlate “bilateralism” and “multilateralism.” On the other hand, the 2001 draft can be seen as a more legalistic attempt to root the right of solidarity (i.e., enforcement) more clearly in the specificities of invocation.<sup>32</sup>

Crawford’s earlier writings are clearly concerned about the relationship between State responsibility and democracy. Before becoming the *Special Rapporteur* for State responsibility (when he was the *Special Rapporteur* regarding the International Criminal Court), Crawford was less reticent about the relationship between enforcement and legitimacy. In a 1994 article published in the *European Journal of International Law*, Professor Crawford explains the inherent difficulty in determining the scope of a countermeasure (here, in the context of “continuing violations” of international law):

It is useful to compare a counter-measure which takes the form of a freezing of assets with one which takes the form of an outright confiscation. No doubt the effects of a confiscation extend in time, but the act of confiscation is a single act which. . . can produce an immediate vesting of title in the confiscating State. By contrast, a freezing of assets is by definition a continuing act. Title to the assets is not affected, merely the right to dispose of them, and the restraint on that right has a continuing character. The point is that the distinction between continuous acts and single acts in time does not correspond to a distinction between serious and less serious breaches, or to a distinction between interim and permanent measures. Indeed one is inclined to say that interim measures are more likely to involve conduct extending in time, whereas single acts in time are less likely to be reversible, or readily reversible. No doubt the principle of proportionality will limit the gravity of single acts

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domestic context in which such measures are to operate.” Koskenniemi, *Solidarity Measures*, *supra* note 1, at 341.

32. Simon Olleson, *Invocation in the Law of State Responsibility and the Structure of International Obligations* (Mar. 24, 2004) (unpublished Diploma thesis, University of Cambridge) (on file with author).

taken by way of counter-measures. But as we have seen that principle is for good reason phrased in a rather general way ('not out of proportion'). It is a rather slender basis for instituting a preference for counter-measures of a reversible or interim character.<sup>33</sup>

The above passage demonstrates that Professor Crawford cares about issues of governance and legitimacy as they relate to the law of State responsibility. Indeed, his inaugural lecture in 1993 as the Whewell Professor of International Law at Cambridge University was titled *Democracy and International Law*.<sup>34</sup> But, just as surely, *Special Rapporteur* Crawford left them out of the ILC Articles. While it is plausible that this disparity is but another recasting of the famous distinction between practicing and talking about practicing international law, I don't find that explanation satisfying.

Indeed, the struggle to systematize the right of solidarity is typical of international law. *Special Rapporteur* Crawford's reliance on this right of solidarity as the primary mechanism of international law enforcement might be a best-effort compromise between a reluctance to create international crimes of state (too controversial) and a desire to implement better international enforcement (systemic need). Clearly then, Article 54 is the result of a paradox. International law must differentiate (normatively) between categories of norms, e.g., the right of diplomatic protection and the prohibition of genocide. But at the same time, international law itself functions without a mechanism for distinguishing between the enforcement of these two norms. (The International Law Commission all but left out reference to the "inherent" right of collective countermeasures.<sup>35</sup>) Thus, the provision will likely serve as a *renvoi* to the customary international law of countermeasures, which the ILC decided was not yet determinate enough to be codified.<sup>36</sup>

33. Crawford, *supra* note 23, at 74-75.

34. See James Crawford, *Democracy and International Law*, 64 BRIT. Y.B. INT'L L. 113, 113 n.1 (1994).

35. Here too, Article 54 of the ILC Articles seems eerily reminiscent of Article 51 of the Charter's "inherent right." Crawford, *supra* note 4, at 55-56.

36. Crawford, *supra* note 4, at 56; see also *id.* at 305, ¶ 6 ("a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law").

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If elements of legitimacy are inherent in the ILC Articles, why would *Special Rapporteur* Crawford prefer not to make them explicit? Two answers are worth briefly noting here. This determination was likely based on the understanding that, as a horizontal system lacking both a written constitution and an institutional enforcement mechanism, international law is contained in a few indefinite rules; inserting more ambiguous principles into the discourse would make the legalistic resolution of international disputes (even more) impossible. This reasoning is not without merit and I will discuss it more below.

The more prevalent explanation for the ILC's omission of any legitimacy discourse is historical. As mentioned above, over the past decade, international law-making has shifted from bilateralism to multilateralism. Thus, the argument goes, it was sufficient for the ILC to codify the multilateralist concept of community interest in Article 48.<sup>37</sup> This approach, it is worth elaborating, is based upon an invalid premise. Namely, Professor J.H.H. Weiler has argued against the theory that there has been a movement from bilateralism into multilateralism; rather, he claims, both have continued to proliferate over the course of the last century.<sup>38</sup> Bilateral treaties thrive alongside multilateral treaties.<sup>39</sup> From a genealogical perspective, argues Weiler, the coexistence of these structures seems like the emergence of Community. The way to conceive of the change, according to Weiler, is geological: "Change, thus, would not be adequately described as a shift from, say, bilater-

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37. Famously, Bruno Simma makes this point in *Bilateralism and Community Interest in the Law of State Responsibility*. See generally SIMMA, *supra* note 20. Article 48 (Invocation of responsibility by a State other than an injured State) states "1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 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 of the group; or (b) The obligation breached is owed to the international community as a whole. . . ." See *supra* note 4.

38. A recent iteration of Weiler's theory is expressed in J.H.H. Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy* 3 (2004) (unpublished manuscript, on file with author).

39. *Id.* at 4 ("Customary law reincarnated itself into the so-called New Sources . . . often using (indeed, piggy-backing on) notions of classical custom . . . [that] often prized the communal and universal over the particularistic.").

alism to multilateralism. What had changed was the stratification.”<sup>40</sup> Indeed, Marina Spinedi, an ILC insider who worked closely with Ago on the codification of treaties and State responsibility, states that “it is hard to discern any direct effect of the debates on these themes on the discussions taking place at the same time in the ILC on state responsibility.”<sup>41</sup> Rather than rooted in the problem of bilateralism, multilateralism stems from the need for international governance. Professor Weiler sees multilateralism as a long-term management regime with increased treaty-based regulations. What he does not see, however, is a legitimacy discourse surrounding this trend: “When there is governance it should be legitimated democratically. But democracy presumes demos and presumes the existence of government. Whatever democratic model one may adopt it will always have the elements of accountability, representation and some deliberation.”<sup>42</sup>

After refuting the second reason for omitting a democracy discourse, we may now revisit the first, namely, that the ILC’s silence was inevitable due to the nature of State responsibility. Perhaps democracy was omitted from the ILC Articles because of an appreciation of international law’s well-known weakness—i.e., its horizontal nature and resulting problem of enforcement (as mentioned above). Rather than creating a substantive code of detailed provisions, the ILC codified State responsibility in a few relatively ambiguous but uncontroversial provisions. While it is surely idealistic to inject democracy into international law, to expect the ILC to do so might be utopian. In many ways, the recent history of international law has been a flight away from this debate.<sup>43</sup> By conceptualizing the laws of breach into secondary norms, the ILC seems poised to codify in its ILC Articles more positive than natural laws. However, as we saw, even positivists cannot avoid the normative debate. At a basic level, the ILC codified bilateralist interests in Article 42 (injured States). *Instrumentally*, at a higher level, community interests are codified in Article 48 (other States). As Martti Koskenniemi writes, “[t]he concept of ‘fundamental . . .’ as

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40. *Id.* at 6-7.

41. Spinedi, *supra* note 18, at 1110.

42. *Id.* at 18.

43. Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT’L L. 4, 4-7 (1990).

well as the ideas of *jus cogens* or imperative norms and rules valid in an *erga omnes* way each presuppose relationships of normative hierarchy . . . .”<sup>44</sup> This expansion of governance in international law (based on certain, higher norms) inevitably draws on different views of international law: naturalist, positivist, formalist, etc.<sup>45</sup>

To summarize, the traditional view is that, over the course of the twentieth century, the ties binding the international community evolved from bilateralism to multilateralism. However, this view neglects the tension between Articles 42 (injured State) and 48 (other States), i.e., governance without government. Arguably, the better reasoning for the ILC’s omission of a democracy discourse is its infeasibility. Perhaps democracy issues are too complex to be systematized into the primitive structure of international law. In this context, it will be helpful now to turn to some of the central debates surrounding the codification of countermeasures.

#### IV. ELEMENTS OF THE DEMOCRACY DEBATE

While many controversies surround the history of codifying State responsibility in general and countermeasures in particular, we will discuss only those few that relate to the enforcement of international law and the encouragement of democratic governance.

First, one can trace much of the ambiguity surrounding solidarity in the ILC Articles to the overlap between primary and secondary norms. For better or worse, the lack of normative guidance in the text causes many practical problems. What is the difference between the norms and how do they distinguish between injured (Article 42) and other (Article 48) States? What is the correlation between peremptory norms (Article 40) and the invocation of responsibility for breaches of obligations owed to the international community as whole (Article 48)? Which countermeasures are available to other States (Article 54)? Arguably, notwithstanding the intentions of the ILC, the pseudo-distinction between primary and secondary rules in the ILC Articles complicates the institutional enforcement mechanisms of State responsibility. Comparing the

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44. Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 EUR. J. INT’L L. 566 (1997).

45. *Id.* at 566-67.

legal positions of injured to other States, ordinary norms to obligations *erga omnes*, and so forth, we are left with a bundle of norms lacking an organized relationship (procedural or substantive) to each other. Conceivably, far from codifying countermeasures, the catch-all Article 54 (Measures taken by States other than an injured State) leaves their nature and scope as open to debate as in the days of *Special Rapporteur Ago* in 1969.

Furthermore, the ILC Articles do attempt to distinguish between different kinds of norms and to enforce them without the force of legitimacy. This is not surprising. The same *Special Rapporteur Ago*, who distinguishes State responsibility by its secondary status, also injects the project with the notoriously controversial Article 19<sup>46</sup>—an attempt to distinguish between those violations that were delicts and those that constitute crimes of State. *Special Rapporteur Crawford* excludes Article 19 from the final draft; but its normative hierarchy is clearly incorporated into Articles 40 (*jus cogens* norms) and 48 (obligations *erga omnes*).<sup>47</sup> This conflation of primary and secondary rules is not addressed in the Commentary. The Introduction to Article 40 merely cites the Vienna Convention on Treaties and *Barcelona Traction*.<sup>48</sup>

Another debate revolves around legitimacy discourse's relevance to the law of State responsibility. We will now consider a few possible ways in which considering democracy may help future attempts at codifying (or at least interpreting) the law of State responsibility. Indeed, by avoiding a discussion of democracy in the ILC Articles (and Commentary), the final product of fifty years work leaves unanswered one of the main questions of State responsibility: What is the appropriate pro-

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46. The authoritative analysis is still JOSEPH H. H. WEILER, ANTONIO CASSESE, MARINA SPINEDI, INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY (European University Institute) (1989), based on an international conference held at the European University Institute in Florence on the topic (in which Ago participated).

47. See Martti Koskenniemi, *Les doctrines de la responsabilité* [*Doctrines of State Responsibility*], in MANUEL DE LA RESPONSABILITÉ INTERNATIONALE [NANTERRE HANDBOOK ON INTERNATIONAL RESPONSIBILITY] (James Crawford & Alain Pellet eds., forthcoming 2006) (Fr.) (manuscript at 8-9, on file with author); Nissel, *supra* note 13.

48. Crawford, *supra* note 4, at 242-43 (citing *Barcelona Traction, Light and Power Co. (Belg. V. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5)).

cedure for taking countermeasures? This is far from a mere technical question that can be administered according to secondary norms. The legitimacy of each countermeasure should and will depend on the normative grounds upon which it is based. For example, the Commentary expansively interprets the international community as a whole to include international organizations (e.g., the WTO) and entities that are not quite yet States (e.g., Palestine). The work does not, however, elaborate on the notion of International Community. Who is a member of this community?<sup>49</sup> As mentioned above, notwithstanding Professor Crawford’s serious writings about the need to inject international law with the (procedural) safeguards of democracy,<sup>50</sup> no such discourse is found in his capacity as *Special Rapporteur* on State responsibility. Crawford only writes about the correlation between State responsibility and legitimacy in his capacity as an academic scholar. In an essay in the *European Journal of International Law*, published a few years before he become the *Special Rapporteur* for State responsibility, Crawford writes that “[i]t is regrettable that . . . [the ILC Articles do] not make it clear that the third party procedure should extend both to the question of the initial unlawful act and to the question of the justification of the countermeasures actually taken. This should be made clear in the Commentary.”<sup>51</sup>

Finally, a central criticism of the ILC Articles revolves around their effectiveness in achieving the primary purpose originally envisioned for them by Sir Hirsch and later developed by *Special Rapporteurs* Ago and Crawford: increased compliance with international obligations. On the one hand, the ILC may have missed an opportunity to include one of the strongest factors for compliance short of a police-force: legitimacy.<sup>52</sup> While the contents of such an addition would likely have been controversial, they are nonetheless conceivable, es-

49. Koskenniemi, *supra* note 24, at 472 (highlighting the same problem in the context of humanitarian intervention). R

50. See Crawford, *supra* note 34, at 113; James Crawford & Susan Marks, *The Global Democracy Deficit: an Essay in International Law and its Limits*, in RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 72 (Daniele Archibugi et al. eds, 1998). R

51. Crawford, *supra* note 23, at 76 n.16. R

52. Regarding legitimacy and compliance pull, see generally THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

pecially today. As Crawford stated at his induction speech as the Whewell Professor of International Law at Cambridge University, “[w]ith this change has come a new stress on democracy as a value, even a dominant value, in national and international affairs.”<sup>53</sup> On the other hand, perhaps State—as opposed to individual—responsibility is intrinsically amorphous. Professor Thomas Franck, undoubtedly a pioneer in the field of international law & legitimacy, recently suggested that State responsibility has a different purpose than individual responsibility. Indeed, asks Franck, why ought there to coexist multiple forms of responsibility for the same wrongful act? Because not all international laws are equal and not all wrongs are “justly redressed solely by imprisoning individuals.”<sup>54</sup> Sometimes the culpability for violative behavior is more diffuse than a handful of criminals. To borrow a domestic law equivalent, “if the modern corporation engages in illegal conduct, it is not only the officers, but also the shareholders who are likely to suffer consequences. The officers may go to jail, but the shareholders will see their dividends plunge along with the market value of their shares.”<sup>55</sup> It is precisely in these cases when a more malleable form of responsibility is arguably suitable. “Justice,” writes Franck, “demands a fair sharing of the costs of reconstituting that which was destroyed.”<sup>56</sup> Thus, Franck’s view lends support to the conclusion that the ILC viewed State responsibility as a field that could only be elaborated imprecisely. This may explain the ILC’s reluctance to discuss democracy, a discourse that would not necessarily have added clarity to an already amorphous field.

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53. Crawford, *supra* note 34, at 122.

54. Thomas M. Franck, *State Responsibility in the Era of Individual Criminal Culpability*, The Butterworth Lecture at Queen Mary College, University of London (Oct. 10, 2005) (unpublished manuscript, on file with author).

55. *Id.*

56. The International Law Commission tried, but failed, to deal with measures of compensation, “leaving the development of rules on the quantification of compensation to be developed by tribunals and practice.” *Report of the International Law Commission to the General Assembly*, 55 U.N. GAOR Supp. (No. 10) at 60, U.N. Doc. A/55/10 (2002).



## V. CONCLUSION

The International Law Commission understandably decided to conceptualize the principles of State responsibility so as to appease all of the commissioners (and governments) and to allow for a flexible system of international law enforcement. Yet, one might have hoped that the Commentary at least would have begun to point in more substantive and legitimating directions than it currently does. It is not immediately clear whether the ILC Articles would have even benefited from a more explicitly normative discourse. Either way, despite its brevity, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* is one of the most authoritative treatises on the topic of State responsibility—more succinct, user-friendly, systematic, and annotated than standard textbooks on the topic.<sup>57</sup>

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57. See, e.g., IAN BROWNLIE, *STATE RESPONSIBILITY* (1983).

