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Summary

State Responsibility for Internationally Wrongful Acts

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1. The efforts of the League of Nations to codify the law concerning the "Responsibility of States for damage done in their territory to the person or the property of foreigners" were not successful. The International Law Commission (ILC) did not pursue the extensive reports and proposals on the same limited topic presented by its special rapporteur *Garcia Amador.*

2. Since 1963 the ILC has been preparing a codification of the general law of State responsibility, which is to a great extent separated from the primary rules of international law. Responsibility in the form of new emerging secondary obligations of the author State or of new emerging rights to be presented shall be linked to the one and undivided precondition — the not justifiable breach of an obligation of international law by a conduct attributable to the State.

3. The ILC adopted in a first reading part I of the draft on the origin of international responsibility comprising 35 articles and commentary, which is based on reports presented up to 1980 by the second rapporteur *Roberto Ago.*

4. a) The new rapporteur on part II dealing with content, forms, and degrees of State responsibility, *Willem Riphagen,* has submitted a catalogue of legal consequences. A first group of consequences — a first parameter — comprises the obligations of belated performance, i. e. to stop the breach, to allow for local remedies and to furnish restitutio ad integrum stricto sensu. If this is materially impossible, a substitute performance is required in granting compensation, reparation, and guarantees against repetition of the breach.

   b) In the second parameter the victim State is entitled to non-recognition of the situation, the suspension of legal relations, "balancing" countermeasures, countermeasures in another field, measures of self-help and ultimately to measures of self-defense. The third parameter comprises the position of third States.

   c) To the judgement of *Riphagen* as Rapporteur the general linkage of consequences listed in the catalogue to the breaches of obligation appears to be impossible.

5. The codification must take into account that at present the law of State responsibility is characterized by a close linkage of primary and secondary rules. The rigid consequence that any breach of an obligation, regardless of its origin, entails responsibility, leads on the one hand to the exclusion of "soft law" from the corpus of international law, but hinders the emerging of new rules of customary international law as well.

6. Rules of primary and secondary law are interrelated in the sense that a more rigid version of the rules on State responsibility would ask for a softer wording of the rules on primary obligations.

7. Rules on State responsibility are to be found widely spread in established international law — in treaties and in customary law. Thus the subsidiary clause in art. 3 of *Riphagen's* third report limits the pretension of the codification considerably. By stating a general precedence for all those secondary norms "prescribed by other applicable rules of international law" the ILA dispenses itself too much from its task of codification.

8. Breaches of obligations within international legal sectoral systems — subsystems — lead in the first instance only to the consequences attributed to such breaches in that subsystem. The existence of such subsystems, their delimitation and the question, under what condition the consequences surpass the limits of that system, complicate the formulation of general rules additionally.

9. The principle of proportionality — as stated in art. 2 of *Riphagen's* third report — demonstrates also that content, form, and degree of responsibility are dependent on the primary obligations infringed. The general wording of that draft article is not sufficient to link a particular legal consequence to a particular breach of obligation.

10. The adopted rules of part I of the draft are rather suitable to an abstract-general codification than the subject of part II. Nevertheless, its wording should be revised, giving up the doctrine of its complete isolation from the rules of secondary law.

11. The formulation of the scarcely disputed rules on attribution, force majeure, and distress as justifications and on intertemporal questions does not justify as such the conclusion of a convention or the declaration of a codex. The distinction between crime and delict in art. 19 is not convincing. Art. 27 on aid and assistance by third States and art. 30 on reprisals demand for more precision and, like art. 19, the supplementation by rules on legal consequences.

12. In part II the formulation of rules on countermeasures against unlawful conduct, especially on reprisals, and of rules on the rights of not

directly injured States to defend fundamental rules of international law is predominant.

13. In view of the close interrelation of legal consequences of a breach and the primary obligation, part II could as well contain a few general rules, supplemented by special rules for such fields where internationally wrongful acts concentrate in State practice. They should cover violations of sovereignty on land, at sea and in the air, and — traditionally — on the protection of person and property of foreigners.

14 The codification of the law of State responsibility can be a success, if it accomplishes to clarify essential questions of content, forms, and degrees of State responsibility in part II.