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THE INTERNATIONAL LAW OF STATE RESPONSIBILITY: REVOLUTION OR EVOLUTION?

Pierre-Marie Dupuy*

The time seems to have come to reassess the international law of state responsibility. Several questions are presented by current developments in the theory and practice of attributing international legal responsibility to a sovereign state. What are the legal basis and the legal consequences of state responsibility? Which states have a legal interest in attributing state responsibility? Finally, has the structural function of international responsibility inside the international legal system evolved during the last decade?¹

Until a few years ago, asking such questions would have only revealed very deep gaps in the legal knowledge of the questioner. The answers were clear and relatively simple. At least from the end of the nineteenth century, due largely to the effects of the positivist doctrine, the unity of the theory of international state responsibility had been strongly established.² This unity concerned both the origin (fait générateur) of the responsibility and its specific function. The origin of the responsibility arose in the commission of a wrongful act by a state, in particular, an act or omission by the state violating its international obligation vis-à-vis another state.³ Additionally, the great majority of

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authors agreed that the unique function of the institution of state responsibility was to secure reparation for damages created by the wrongful act, since its only legal consequence was to burden the responsible state with the subsidiary obligation to make reparations for the tortious results of its wrongful act.

This simple link between the source of responsibility and its legal consequences had another significance: there were, in principle, only two states concerned with international responsibility for a wrongful act: the acting state and the state that suffers damage resulting from the act. Thus, only the directly damaged state had a right that was affected by another state's wrongful act.

Recent developments urge a reassessment of this classical doctrine of state responsibility. In fact, the foundations of the theory began to shake more than twenty years ago. The first indications of a disruption in the basic unity of state responsibility emerged as early as the mid-1960's, when the eminent scholar Wilfred Jenks, expressing an already relatively deep movement of thought, pleaded for recognition of state liability for the potentially catastrophic damage caused by their "ultra-hazardous activities." Since he characterized this liability as existing "without proof of fault," and purported to promote it not only on the basis of special agreements but in general international law as well, it appears to be one of the earliest modern attempts to disassociate, in regard to certain kinds of damages, the obligation to make reparations from the previous commitment of a wrongful act.

An elaboration on the same idea appeared a few years later, when the International Law Commission ("ILC") was urged to study and codify the international liability of states "for injurious consequences

4. See, e.g., Bourquin, Règles Générales du Droit de la Paix, 35 RECUEIL DES COURS 218 (1931); Basdevant, Règles Générales du Droit de la Paix, 58 RECUEIL DES COURS 668 (1936); Strupp, Règles Générales du Droit de la Paix, 47 RECUEIL DES COURS 561 (1934); Lillich, The Current Status of the Law of State Responsibility for Injuries to Aliens, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 1-16 (R. Lillich ed. 1983). A minority of authors has criticized the classical theory as being too narrow, some of them pleading in favor of an international penal responsibility of states in certain cases. See in particular, for the theory of "penal damages," J. Ralston, The Law and Procedure of International Tribunals 250-67 (1926); Saldana, La Justice Pénale Internationale, 10 RECUEIL DES COURS 227 (1925); V. Pella, La Criminalité Collective Des États Et Le Droit Pénal De L'Avenir (2d ed. 1926); H. Donnedieu De Vabres, Les Principes Modernes Du Droit Pénal International (1928); see also P. Jessup, A Modern Law of Nations: An Introduction 11 (1948).


arising out of acts not prohibited by international law." 7 Of course, several conventions previously had paved the way for the establishment of a "primary obligation" of reparation.8 However, only one of them, covering reparation for damages caused by falling space objects, directly concerned state responsibility in public international law.9 The question was then and is still whether, outside of any special agreement, there is room for such a liability in general or customary international law.

Whatever the answer, the common ground between this general liability and the classical model of state responsibility for wrongful acts is the role or function of the institutions. In each case, what is in question is the pure allocation of reparation. The evolution of a general liability of states affects the origin of the obligation to make reparations, but not its content, nor its continuing role as the primary, if not the only, function of the institution of state responsibility in international law.

As these shifts occurred, another evolution, again starting from the works of the I.C.J. on international responsibility, threatened to implicate not just the origin of the obligation to make reparations, but the legal consequences of committing some kinds of wrongful acts as well. Article 19 of part one of the Draft Articles on State Responsibility distinguishes between two kinds of wrongful acts: international crimes, which are defined as the breach of "an international obligation essential for the protection of fundamental interests of the international community," and all acts which, though not crimes, "constitute an international delict." 10


9. Christol, International Liability for Damage Caused by Space Objects, 74 AM. J. INT'L L. 346, 352 (1980); see also Foster, International Liability for Damage by Space Objects, 10 CAN. Y.B. INT'L L. 137, 142 (1972); see also Dupuy, supra note 8, at 45-97; L. Gutierrez, Legal Status of Space Vehicles, in PROCEEDINGS OF THE 9TH COLLOQUIUM ON THE LAW OF OUTER SPACE 132 (1967).

10. See Draft Articles on State Responsibility adopted by the International Law Commission
Here, the concern becomes the consequences of state responsibility, and which states have an interest in the attachment of that responsibility. ILC discussions of "the content, forms, and degrees of international responsibility" (part two of the Draft Articles) show a shift from a tendency to stress the obligations of the responsible state, to a stress on the right of the injured state (the definition of which is considerably extended). The function of responsibility appears to be in this context not only to secure compensation for damage, but to sanction or penalize the responsible state. A final indication of the dissolution of the classical unity of state responsibility is the emphasis by Professor Riphagen, the former special rapporteur of part two of the articles, on the existence of "self-contained regimes" of responsibility, i.e., conventionally defined legal consequences attached to the breach of treaty obligations.11

Thus we see, at this time, a fragmentation of the theory of international state responsibility, a fundamental institution of the international legal system. This should not necessarily be cause for alarm. Although intellectually more satisfying as a coherent legal instrument, there is no reason to blindly cling to a limited and perhaps outmoded classical theory. In fact, this multiplication of legal regimes, more or less orchestrated by the ILC, may constitute a major advancement in the international legal system. In other words, the rapid evolution of international state responsibility is not necessarily a symptom of disease; rather, it may be a sign of vigor and ripeness.

Yet, before accepting this heartening conclusion, the duty of schol-
ars is to verify the reality of this diversification of the legal groundings of the different regimes leading to reparation or sanction. Very much influenced by the structure and physiognomy of the works of the ILC, and in particular by the fascinating demonstrations of Professor Roberto Ago, an number of important authors have treated each of the questions presented above, i.e., the appearance of liability without fault and responsibility for crimes of states, without considering any point of contact between them. This view is possible, as has been pointed out above, because each concerns substantially different problems. Nevertheless, their common element is the commission of a wrongful act. On the one hand, has the wrongful act ceased to be, in regard to damages caused by certain types of activity, the conditional element of a requirement for reparation? And on the other hand, has the wrongful act become divided into two categories, namely international crimes and international delicts? In other words, before entering a discussion of new legal regimes, it seems necessary to show that each of these regimes is founded on different legal notions and concepts. However, the emergence of new regimes does not necessarily require shifting legal grounds. The object of this essay is to verify this statement.

After briefly summarizing the classical doctrine of state responsibility, Part One will discuss whether extending compensation to the harmful consequences of certain hazardous activities necessarily involves the recognition of a “liability for lawful conduct” without any link to traditional ideas of state responsibility.

Part Two, starting again from responsibility for wrongful acts, will discuss whether raising a new category, the breach of an “essential obligation” or “international crimes,” confers not only an obligation to make reparations, but a right, in both the victim state and the non-victim states, to sanction the responsible state.

I. RESPONSIBILITY AND LIABILITY

A. Classical Doctrine

The classical doctrine, though founded much earlier, reached its final form at the end of the 19th century and during the first quarter of the 20th century under the influence of the positivist school. Thus, Anzilotti, Basdevant, Bourquin, and Brierly, in particular, brought the notions of responsibility and liability into almost total synonymity (in French, the single term “responsabilité” serves to describe both.)\(^{12}\)
Under this doctrine, which, with a few exceptions, has molded positive law until quite recently, international responsibility may be defined according to its content, which consists of the state's liability for its own wrongful acts. The legal bond resulting from committing a wrongful act may be viewed bilaterally, uniting the wrongdoer with the state it has injured.

This unified theory of responsibility and liability evolved in two ways. The first was a radical pruning of the notion of a wrongful act giving rise to responsibility. According to Anzilotti, the wrongful act is one that deviates from "objective international law." Thus, all that is needed to establish wrongfulness is a manifest contradiction between the actual behavior of the state and the prescription of the rule of law. No reference is made to the psychological state of the actor. This dramatic simplification was intended to make a clean break between the wrongful act and the theory of culpa, stemming not from the Roman but chiefly from the Natural Law. Here, the state, a corporate body, does not have human feelings; it obeys the rules or ignores them, that is all. A second, no less drastic simplification of the link imputing the wrongful act to the state is made by the classical authors. Anzilotti, again, states simply: "Imputability, from the viewpoint of international law, is nothing more than the consequence of the causal link between an act against international law and the activity of the State from which the act comes." This systematic rationalization inevitably comprises some fictions. For example, in many cases the content of the responsibility is so defined that the behavior it refers to is legal only when conforming with certain motives or requirements. To enforce these rules, research into the motives behind a state's acts or omissions is necessary.

Examples of this type of case are numerous. For instance, paragraph four of Resolution 1803 (XVII) of the General Assembly of the U.N., relating to Permanent Sovereignty over Natural Resources (which, it is generally agreed, has become a customary rule) states that nationalization, expropriation, or requisition must be grounded upon reason of public utility, security or national interest. In practice, the presumption that good faith attaches to the acts of sovereign states


15. Id.

will force a victim to bring proof in the case of the non-legal motivations of the nationalizing public authority. Nevertheless, the judge or arbitrator may, in accordance with this rule, examine the "subjective motivation" which caused the State to decide upon nationalization. Similarly, in order to establish whether the recourse to armed force constitutes an "aggression," the text of Resolution 3314 of the General Assembly provides certain criteria. The use of armed force against "the political independence of another State" (art. 1) is considered an "aggression," whereas its use in order to win self-determination, liberty or independence for peoples deprived of these by force could, according to article 7, in some cases be considered non-aggressive. Again, it is the purpose for which force is used that determines the illegal nature of the act.

Finally, application of the general principle of non-discrimination, whether in respect of human rights, the treatment of foreign individuals, or economic matters, will often require an investigation of the discriminating act's finality. Precedents could also be cited, such as where Judge Ammoun, in his separate opinion in the Barcelona Traction case, wrote: "[m]any decisions have not avoided all confusion between reparation stricto sensu, as in private municipal law, and the 'satisfaction' demanded by powerful States, which gives reparation lato sensu the character of a measure aimed at deterrence or punishment." Nevertheless, it is suggested that these criticisms, while they show the over-simplified nature of the classical positivist doctrine, do not outweigh the advantages of the thesis of unity itself. In fact, the result of simplifying the concept of wrongful act, pruning the link of imputation down to a causal connection and unifying the object and the purpose of engaging responsibility, has been to assemble a well-oiled compensating mechanism, giving to the judge or arbitrator a series of references and operative concepts which are efficient and allowing a


19. See Lillich, supra note 4.


certain latitude in their application through adapting his personal appreciation of the facts and attitudes to the circumstances of the case. The element of compensation present in international responsibility is evidently still flourishing. The I.C.J. decision in the Iran Hostages case demonstrates very well this vocational consistency inherent in the responsibility of states. After having observed the Islamic Republic's violation of several of its international obligations, the Court concluded, by a 12 to 3 margin that:

The government of the Islamic Republic of Iran is under an obligation to make reparation to the Government of the United States of America for the injury caused to the latter by the events of the 4th November 1979 and what followed from these events.22

Thus, while perhaps not exclusive, the obligation to make reparation for the damage caused by its violation of law remains a vital consequence of the engagement of a State's responsibility.23

B. Extending the Compensatory Function of Responsibility

The compensatory function of responsibility remains strong, even if in a new form deviating from that of classical reparation. The legal grounding, however, seems relatively unchanged, despite the currently fashionable view to the contrary.

Much has been discussed in the literature and in the International Law Commission about states' international liability for damage caused by "ultra-hazardous" or "abnormally dangerous" activities.24 The ILC refers to "international liability for injurious consequence arising out of acts not prohibited by international law."25


23. One should notice, for instance, that in the Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 20 (Merits: June 27), the principal request of Nicaragua was to ask the Court:

"Third: to adjudge and declare that, in consequence of the violations of international law indicated . . . compensation is due to Nicaragua, both on its own behalf and in respect of wrongs inflicted upon its nationals . . . Fourth: without prejudice to the foregoing request, the Court is requested to award to the Republic of Nicaragua the sum of 370,000,000 United States dollars, which sum constitutes the minimum valuation of the direct damages . . . resulting from the violations of international law indicated in the substance of this Memorial."

In the Rainbow Warrior case, the agreement between France and New Zealand offers another example of a state which is the victim of a wrongful act requesting compensation from the offending state to fulfill its responsibility under international law. See generally Echanges de Lettres Relatifs an Reglements des Problemes nes de l'incident du Rainbow Warrior, signes à Paris le 9 Juillet 1986 (2), 90 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1094-1098; Charpentier, L'Affaire du Rainbow Warrior, 31 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 210 (1985); Apollis, Le Reglement de l'Affaire du Rainbow Warrior, 91 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 9 (1986).


25. See Magraw, supra note 7, at 306; Dupuy, supra note 8.
The Commission's concern, which can be understood from the theoretical premises established earlier by R. Ago, has been, from the beginning, liability as a primary obligation. The ILC was then exposed to the danger of creating an artificial gap between wrongful acts and "acts not prohibited by international law." In fact, if one considers state practice as well as the very few cases dealing with this matter, it is clear that this legal barrier simply does not exist when not voluntarily established in advance by states in formal agreements, as occurs in public international law only in the 1972 Convention on International Liability for Damage Caused by Objects Launched into Outer Space.

The evolution of the works of the ILC, based on the five reports of the late Professor Quentin-Baxter, is illustrative of the profound theoretical and practical difficulties encountered when trying to construct a completely autonomous international liability for lawful conduct. The work of the ILC on M. Barboza's reports confirms this problem.

After a courageous attempt in this direction, the first Special Rapporteur on this topic has progressively moved towards a scheme in which the principle of strict liability is relegated to a very subsidiary role, with emphasis on the general obligation to cooperate and its numerous implications. The result of this work was to reintegrate this liability into the framework of the classical responsibility for wrongful acts.

Observing this evolution, one of the most rigorous and pertinent scholars in his field, Professor Gunther Handl, has attempted to define a theory of liability for lawful acts. Regarding the scope of a strict liability or "liability for lawful acts," he clearly departs from the


27. 10 I.L.M. 250 (1972).


opinion expressed by authors like Wilfred Jenks and L.F.E. Goldie, who assign to it a much larger field, extending to the coverage of all damages caused by "ultra-hazardous activities." In Handl's view, the source state of a transboundary harm bears no responsibility unless its conduct has fallen short of the standard of care that, in the circumstances of the case, this state could reasonably have been expected to adopt.

This idea should certainly take into account the general evolution of the law of cooperation which has been developing for almost twenty-five years, particularly in the field of the protection of the international environment. This law concerns, in reality, the definition of the contemporary conditions of a state's exercise of its territorial and personal jurisdiction in regard to other states and the international community as a whole. The general trend emerging from the many texts, "soft" as well as "hard," which have been adopted during this period is clearly oriented towards a more precise definition of the general obligation of "due diligence" required of every sovereign state regarding activities likely to cause transboundary damage. There is no general consent in the international community on the definition of an "ultra-hazardous activity;" nor is there, consequently, any agreement on a legal regime of liability to compensate the victim state. One could have thought, at minimum, based not only on existing international agreements but also on special municipal legislation in this matter, that the "civil utilization of nuclear energy" would be regarded as such an internationally recognized hazardous activity. Yet, the aftermath of the accident at Chernobyl has emphatically demonstrated the contrary. Professor Handl's assertion that strict liability for ultra-hazardous activities does not exist in general international law is thus conclusive.

Less convincing, however, is Professor Handl's attempt to retain a liability of states "for lawful activities" in "cases of loss-shifting in which transnational harm is inherently accidental and there is no evident failure on the part of the source State to act in accordance with an incumbent obligation to prevent such harm." In theory, this con-

30. See Jenks, supra note 5, at 99-200; Goldie, supra note 6, at 1189.
32. See CENTER FOR STUDIES & RESEARCH, HAGUE ACADEMY OF INT'L LAW, TRANSFRONTIER POLLUTION AND INTERNATIONAL LAW 33-126 (1985); WORLD COMMISSION ON ENVIRONMENT & DEVELOPMENT, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT 5-133 (1986).
34. See Handl, supra note 26, at 60, 76-79.
clusion seems to be a logical one. It recalls in particular the cases in which the common law systems, on the basis of the rule laid down in *Rylands v. Fletcher*, established a regime of strict liability. It is, however, very difficult to elaborate a comprehensive notion of "inherently accidental" situations in general international law, outside of "force majeure," in which the liability of the source state would in principle not attach. The reasons are similar to those which explain the absence of a stable, well-delimited definition of "ultra-hazardous activities." In fact, what is to be considered is not the accidental situation itself, but the activity at the origin of it. As recognized by Professor Handl, accidents arising non-negligently are "rather exceptional," if not non-existent. This state of things derives also from the progressive accumulation of standards and rules defining more and more precisely the required "due diligence," especially in regard to dangerous activities. Admittedly, when consulting the practice of states one can find sporadic examples of state practice in which an accidental transnational harm has given rise to compensation, some appearing not to have been granted "ex gratia." But these precedents are much too rare to be regarded as the clear expression of an "opinio juris" of the international community of states.

Once again, the Chernobyl case is illustrative in this context. It was an accident, caused by an activity in which the utmost care is generally expected of the operator (one of the reasons why the existing conventions establish in regard to it a private international regime of strict liability.) Now, without entering into the details of this case, two general observations can be made here. First, it is clearly established that this nuclear accident, like earlier ones in other countries,

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36. See Dupuy, *supra* note 8. This notion is highly relative, since it depends very much on control of the technologies involved, as well as the psychology of the legislator, both of which may vary considerably over time. For a recent survey of national legislation, see *Survey of State Practice Relevant to International Liability for Injurious Consequences Arising Out of Acts Prohibited in International Law*, U.N. Doc. A/CN.4/384, at 222 (1984).


38. See *supra* note 32.

39. See *Survey of State Practice*, *supra* note 36.

finds its origins in a series of seriously negligent acts taken by both the staff of the plant and the Soviet authorities. This proves once again that damages caused in the context of nuclear civil energy are not "inherently accidental," a conclusion which could be similarly drawn in chemical disasters such as Seveso or Bhopal, or other harmful consequences of modern industrial and technological activities. Second, the attitude of the states directly or indirectly concerned by the accident is highly demonstrative. The USSR has plainly asserted that there is no international rule of liability for the compensation of damages resulting from such an accident, but, more significantly, no competent authority from the victim states enjoying radioactive fallout has invoked either the negligence of the Soviet government or the existence of a general customary rule of strict liability on the basis of which they could have claimed compensation. Similarly, on a regional scale, although occurring in a context of intense solidarity and cooperation, the November, 1986 Sandoz Fire which produced massive pollution in the Rhine River and the riparian states downstream, demonstrates exactly the same absence of invocation by any concerned state of a general rule of strict liability applicable to Switzerland. Any identifiable consensus between sovereign States today in this matter would thus be twofold. First, that there is no precise category of "inherently accidental" situations, and secondly, that in the case of accidents caused by dangerous activities provoking transboundary harm, no rule of strict liability applies to the source state.

Thus, what is clear is that any attempt at elaborating a general theory of liability based on the qualification of the facts at the origin of the damage is simply misleading. The true question is not whether a state must make reparation for damage even if it is caused by a legal international act. The lawfulness of an act is not, indeed, an intangible thing, established a priori. It depends very much upon the entire factual and normative context in which it is undertaken. While it may be legal today, in certain circumstances, and in certain legal conditions, it could be illegal tomorrow, or be in the process of becoming illegal, if the concrete situation or the law applicable to it is changing. Experi-

41. See Handl, supra note 40, at 33.
43. See Kiss, "Tchernobâlé" ou la Pollution Accidentelle du Rhin par des Produits Chimiques, 23 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 719 (1987); Rest, The Sandoz Blaze and the Pollution of the Rhine in Regard to Public International Law, 1987 TIJDSSCHRIFT MILIEU AANSPRAKELIJKHEID 59.
44. For further developments on this issue, see Dupuy, supra note 1, at 68-77.
ence with the evolving law of torts in the municipal law of several states within the United States furnishes an excellent illustration of this, in a similar context. Of course, it can always be argued that, for example, the building of a dam or the utilization of nuclear energy for peaceful purposes are inherently legal for a state, as exercises of its sovereign territorial rights. But these activities only remain legal insofar as they lie within the standards of due diligence existing in order to prevent any harmful use of the national territory. And in the case of an accident, the burden could indeed rest with the origin state to prove that the accident does not demonstrate in itself that the obligation of due diligence has not been ignored. But that corresponds only to a reversal of the burden of proof, no more. Fundamentally, in such a situation, the framework of the classical responsibility for a wrongful act remains.

The question is not the qualification of the harmful act. It is a much more pragmatic, empirical one: can an innocent victim (in this case a state third party to the dangerous activity involved) obtain compensation without having to prove that the origin of the damage was a wrong or a technical negligence, which may be very difficult? The creation of conventional regimes of strict liability, in the area concerning damage caused by peaceful use of the atom or maritime transport or offshore oil exploration have brought affirmative answers to this question, but by imputing the obligation to compensate to a private person, the "operator" of the activity in question. And even in the only conventional regime of strict liability of states in public international law (the 1972 space law convention), the legal regime created seems to describe a liability established without requiring proof of the existence of a technical fault or negligence rather than real liability for an activity not prohibited by international law. An example is the fall of the Soviet satellite Cosmos 954 on Canadian territory.

Alongside existing conventional regimes, or foreseeable and desirable conventions on other hazardous activities, strict liability regimes could be easily instituted. But other techniques making use of presumptions or, in the law of the environment, of quantified eco-standards, could also make access to reparation much easier than

45. See Anderson, supra note 35.
47. See Christol, supra note 9.
48. See Sand, The Creation of Transnational Rules for Environmental Protection, in I.U.C.N. ENVIRONMENTAL POLICY AND LAW PAPER NO.15, TRENDS IN ENVIRONMENTAL POLICY AND LAW 311 (1980). International eco-standards are essentially divided into two categories. The first is that of qualitative eco-standards. These are basically parameters taken into account be-
classical responsibility theory allows while remaining within the limits imposed on responsibility for wrongful acts.49

To conclude on this first point, the different tendencies discussed above, far from illustrating the decline of the classical function of responsibility, i.e., to give rise to reparation, may, on the contrary, be seen as reaffirming it, at the minor cost of diversifying the legal regimes which put it into effect, but without necessarily changing its fundamental legal basis.

At the same time, without any special link between the two evolutions, another movement can be seen. In contrast with the first, these new trends emphasize the wrongfulness of certain acts. The commitment of such acts is described by some states and authors as demanding not simply reparation but “sanctions,” a term which will be revealed next in all its ambiguity.

II. RESPONSIBILITY AND SANCTION

The works of the ILC on the content, forms, and degrees of international responsibility, as well as the practice of some states in the past decade, have shown one outstanding feature: to a large extent, the debate seems to have shifted during the last twelve years from the classical emphasis on the obligations of the responsible State, towards an awareness and definition of the rights of the injured State or States vis-à-vis the responsible one.50 This development is closely connected

cause they influence the quality of the environment and the ecological equilibrium of a given natural resource. Although these standards are useful, they are often still open to discussion, both because of the “soft” (i.e. non-compulsory) character of many of the legal instruments incorporating them and because of their widely varying effectiveness. They do, nevertheless, contribute to the definition of the guidelines, rules of good behavior and “due diligence” of the “well-governed” modern state in contemporary international law. The second category is that of quantitative eco-standards which are generally set by agreement among technicians and experts in the matter. These eco-standards are frequently encountered in technical annexes and occasionally the text of some conventions for the protection of the environment. For a typical example see Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River, Aug. 30, 1973, United States-Mexico, 24 U.S.T. 1968, T.I.A.S. No. 7708, reprinted in 12 I.L.M. 1105 (1973). For an examination of the system of presumption of responsibility and the burden of a state infringing technically quantified water quality norms, see Dupuy, supra note 1, at 74-77, 87-90. The mere technical demonstration that the riverwater arriving from the upstream state does not meet the agreed standards establishes a presumption that the upstream state has violated the terms of the convention; see also I. Brownlie, supra note 1; I. Brownlie, Principles of Public International Law 477 (3rd ed. 1979).

49. See supra note 46.

with another: in case of failure of certain kinds of obligations, not only one but, in certain cases, all states seem now concerned with consequences of these international wrongful acts.

Still, the state that has an individual right directly affected goes on being the first concerned. It remains the only one that can ask for material reparation or even moral satisfaction for the direct damage suffered. But when the wrongful act concerns "fundamental interests of the international community," like in the case of an act of aggression, for instance, then other states, in fact all other states, belonging to this community should be logically considered as having a legal interest in the attachment of international responsibility to the state actor.\footnote{1} This is a result of the fundamental distinction already mentioned between "international delicts" and "international crimes" and applies only to the latter of these categories. It explains why, when presenting his second series of draft articles in his third report, Professor Riphagen insisted on the existence of two kinds of "injured states," those that are "directly" injured, and those that are "indirectly" injured by an international crime. This is terminology that, in itself, seems to be inaccurate; all states could consider themselves to be "directly" affected by a crime, but not in regard to the same legal interest.\footnote{2} What matters in this respect is to understand the logical sequence which has led progressively to the widening of the legal interests involved by the breach of some "community obligations"\footnote{3} and, consequently, of the categories of states concerned with the implementation of the international responsibility which a particular wrongful act entails.

From this point of view, the emergence of an international criminal responsibility, even if it remains highly problematic both substantively and procedurally, follows the logic of a certain evolution, not only based on the special character of the obligation ignored by the responsible state but stemming from a comprehensive perception of the implications and consequences of international responsibility for


\footnote{2} See infra p. 123.

\footnote{3} i.e., obligations "so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the community as a whole." Draft Articles on State Responsibility, supra note 10, art. 19.
wrongful acts. In fact, this perception existed long before the proposals made in this respect by the ILC in 1976. Here again, the analysis leads to the conclusion that, between the classical concept of state responsibility and its new "criminal" trends, there is, to a certain extent, more of a continuity than a brutal discontinuance. After having discussed the fundamental elements of the phenomenon, we shall come back to the content of the rights of the "injured states" in the context of international "criminal" responsibility.

A. The Real Consequences of the Implementation of International Responsibility

What is important here is to realize how the notion of "legal interest to act" on the implementation of responsibility starts from a certain conception of the consequences of responsibility which preceded the actual tendency towards an enlargement of the categories of states possessing such a legal interest. It is generally agreed that the principle of "restitutio in integrum" is clearly recognizable in the famous statement of the Permanent International Court of Justice in the Chorzów Factory case. The Court there stated the principle that reparation must, as far as possible, negate all the consequences of the wrongful act and reestablish the situation which should have prevailed if this wrongful act had never been committed. 54

That formulation is still up to date. Proof may be found in a still recent arbitral decision, 55 but also in the second report by M.W. Riphagen before the ILC. 56 It appears explicitly in two articles of his successive drafts as well. 57 It is in terms of restitution then that the consequences of a wrongful act have been traditionally viewed. However, within this vast and rather ill-defined framework, it would be advisable to distinguish what is effectively associated with compensation for material damage from that which aims at reestablishing legality.

In fact, it appears that rather than speaking of restitution, too easily considered as one of the normative consequences of an illegal act and consisting solely of compensation, it would be preferable to insist on the idea of restoration. The point is still to restore the victim to his initial material position. But it is also to reestablish the legal situation

54. Factory at Chorzów (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 8 (July 26).
57. Riphagen, Second report, supra note 50, at 101 (Draft Article 4(c)); Riphagen, Third report, supra note 50, at 48 (Draft Article 6(c)).
that existed before the violation. In other words, committing an illegal act strikes two blows: one at the rule of law, and the other at the interest protected by the law. A wrongful act is the equivalent, so to speak, of a failure to recognize both the law and an individual right. Restoration is an expression suggested to designate the object and purpose of responsibility as it is seen from these two angles, objective and abstract on the one hand, subjective and often material on the other. It encompasses both the reestablishment of the legal situation before the action (to guarantee the integrity of the law) and compensation for the damage incurred, in order to safeguard the victim's interest.

In many cases, these aims are achieved by the material compensation for damage caused, which better explains the assimilation of both elements by the doctrine. When the French embassy in Libya was set afire by demonstrators a few years ago, revealing a defect in the Libyan authorities' preventive measures, the host government discharged itself, albeit slowly, of its obligation to restore the situation, both material and legal, to what it had been before the incident, by assuming the costs of a new embassy building. The compensation awarded constituted recognition that the act at the origin of the incident was, at the same time, of an illegal nature and imputable to this State. Furthermore, compensation is often accompanied by apologies or the expression of regret by the responsible State, addressed to the victim State, by which "satisfaction" is deemed to have been given. In the very rich area of injury caused to the person or damage caused to the property of aliens, material restitution or money payment and restoration of the legal situation become completely intertwined.58.

But this is not always the case. To return to the hostage case (USA v. Iran), it is illuminating to analyze the actual structure of the Court's conclusion. It begins by declaring the illegal nature of the various actions of the Islamic Republic. It then calls upon Iran to put a stop to the continuing illegal situation (illegal detention of embassy staff). It concludes by stating the obligation for Iran to compensate the United States.59. The various elements constitute the restoration of a situation conforming to the prescriptions of law. As described above, such a perception of the implementation of responsibility has inspired draft article 6, proposed by W. Riphagen in his Fifth Report, which corresponds to the classical viewpoint. As a matter of fact, Anzilotti himself, a true representative of the classical view, has described the main

58. See Lillich, supra note 4.
outlines of the problem as follows: "la violation de l'ordre juridique international commise par un Etat soumis a cet ordre donne ainsi naissance a un devoir de reparation, qui consiste en general dans le retablissement de l'ordre juridique trouble."\textsuperscript{60} He continues by adding: "Le dommage se trouve compris implicitement dans le caractere anti-juridique de l'acte. La violation de la regle est effectivement toujours un derangement de l'interet qu'elle protege, et, par voie de consequence, aussi du droit subjectif de la personne a laquelle l'interet appartient."\textsuperscript{61}

Nevertheless, while based on a rather abstract conception of damage, this view was less advanced than that of the ILC in its notion of dematerialization of the responsibility. The definition of responsibility is greatly enlarged, since it no longer focuses only on the responsible state's obligation, but is defined as all sorts of new relations which can originate in international law in the wrongful act of a state.\textsuperscript{62} This new definition paved the way for a progressive widening of the interest in restoration, and, consequently, to a differentiation of the categories of states possessing such an interest. For Anzilotti, even material damage only affected a subjective interest, while for the ILC, insofar as the need created by the damage disappears, the victim's individuality blurs. The materialist, patrimonial view of responsibility was narrow but it limited the link then established to a bilateral relationship between the source of the damage and the individual victim. This link was not changed by Anzilotti, insofar as it reduced the damage to the violation of a subjective right, but his abstract conception of the prejudice opened the way towards widening interest at restoration. Indeed, insofar as it is no longer simply a case of compensation for material damage but of reestablishing legality, widening the ambit of the legal obligation violated will suffice if cardinal importance is given to such an obligation within the membership of a legally defined group,\textsuperscript{63} each of its members possessing an objective interest in restoring the law. This is what was accomplished by the ILC in 1976 by adopting article 19 (part 1). But in this article, the legally defined group is the international community itself.
B. Responsibility and the Rights of Injured States

As already mentioned, it seems incorrect in law to speak of States "indirectly injured" or *a fortiori* of "third States" in relation to the attachment of an international responsibility for a crime of State. It follows logically from the nature of the "community obligation" which has been breached in such a case that all the sovereign States, since they belong to the universal community, are directly concerned. One of them is, however, affected in its subjective (i.e. individual) rights by the crime, because one of its own sovereign rights has been infringed upon. An example is the case when part of a State's own territory, and thus its subjective rights, has been invaded, while other States are affected in their objective right to the restoration of the international legal regime composed of those norms of public policy which are of "essential importance" for the integrity and maintenance of the international community. It is quite clear that in reality the difference of right (subjective or objective) which has been outlined above also explains the different aims of each State’s action. But this difference, simple in theory, might become more blurred in practice, particularly when all reactions to illegal behavior are confused by referring to them as "counter measures" as invited by article 30 (part 1) of the ILC draft.

The discussion of these ideas encompasses not only the content and commentaries of the ILC work based on R. Ago’s reports, but also, on the one hand, by the doctrine of eastern, i.e. socialist, authors and, on the other hand, by the effective practice of Western countries, in particular the United States, and also, though often less enthusiastically, the Western European countries, acting jointly or separately.

The socialist authors have produced among the earliest analyses in which international responsibility is presented not only as a means to allocate reparation to the victim State but also as an instrument for the reestablishment of international legality. For them, international re-


responsibility thus defined lato sensu established a new legal relation between the defaulting State and the others legally concerned, and this new relation appears as soon as the primary obligation has been breached, and only by the fact of this breach (damage, then, is not a necessary element of international responsibility). One should recognize here ideas which correspond to those of R. Ago. Nevertheless, as far as the international responsibility for crimes is concerned, an important aspect of the socialist position is that, in spite of its appellation, this responsibility does not introduce a "criminal" or "penal" responsibility in international law. It simply incorporates the legal consequences attached to the breach of particularly important obligations.66

In any case, one must notice that the socialist countries have not used this argument to justify their practical conduct of international relations. The paradox is that, while criticizing the above-stated conception of international responsibility, the United States and the European countries have taken several initiatives, acting individually or jointly, for example in the framework of the meetings of the Group of Seven or inside the European Council of Heads of State and of Government. Especially during the first part of the 1980s, they "sanctioned" the breach of some fundamental international obligations by several other States, such as the USSR, Poland, and Argentina, revealing conceptions which, in fact, are not that far from the theories of the other side. The American measures against Iran in the hostage case and the British measures against Argentina in the Falklands affair should be considered separately; they come under the classification of classic bilateralism and concern, in the former case, reprisal and, in the latter, legitimate self-defense.67 But all the other "sanctions," as described by their proponents, have been taken not for compensation or restoration of a subjective right but to punish for failure to fulfill an "essential obligation" and to put an immediate stop to it.

When one examines the motives for these actions, as explained by Heads of State or ministers in speeches or official statements, and when, furthermore, the nature of the obligation concerned is examined, it is striking to observe that the object of the measures taken by "objectively injured" States (as described above) was indeed to punish for infringement of intentional law and to reestablish the legality. The legal obligations concerned in Afghanistan, Lebanon, Iran, Poland or the Falklands are easy to identify; the principle of non-re-
course to force and the prohibition of aggression are directly connected with the Soviet presence in Afghanistan, the Argentinean behavior in the Falklands and Israel’s invasion of Lebanon. Non-intervention in the internal affairs of a foreign State is at issue in both the Afghanistan case, and in Lebanon; respect of a peoples’ right to self-determination and to govern themselves has also served as a basis for accusations against the USSR in Afghanistan and in Poland, where, unusually, the Polish government was itself concerned. Frequently associated with peoples’ rights, the guarantee of fundamental liberties has also served as a legal ground for sanctions in the Afghan, Polish and Iranian cases. Finally, in the Iran case, everyone, including the I.C.J., agreed that there had been a flagrant violation of diplomatic and consular privileges and immunities on the part of the Islamic Republic. This list should include the measures taken in the summer of 1985 and later in 1986, again by some Western countries, but more particularly by France, against persistent apartheid practiced by the government of South Africa.

Could this, then, be said to constitute a universal consecration of an “actio popularis” in international law? The evidence of discussions within the ILC has raised a number of questions concerning the regime of responsibility for infringement of “community obligations.” While the right of states “objectively injured” to take measures against states responsible for certain clearly illegal acts is no longer really questioned, the nature and form of the responses required of these states as defenders of the international legal order are still under discussion.

Even so, the contemporary use of the umbrella term “countermeasures” seems to have encouraged an amalgamation of different legal institutions, reprisals, retortion, institutional sanctions, and even legitimate self-defense. They are certainly all responses to a previous
violation of law, but there the likeness stops. Beyond that, the framework within which they occur and their consequences are completely different. The clear danger here is that, starting with the diversification of regimes of responsibility for different kinds of wrongful acts, a tendency may appear to confuse distinct legal institutions and give rise to uncontrolled reactions or initiatives taken in the name of defense of law and order but in reality aimed at satisfying very narrow national interests.

**GENERAL CONCLUSIONS**

In every system of law, responsibility as a legal institution plays a leading part, because it both organizes and reveals the level of integration of this system, as well as the prevailing conceptions inside it regarding the nature of rights and of obligations, the consequences of their infringement and, perhaps more deeply, the ethical and social foundations of the whole. The establishment of a certain type of responsibility requires contemplation of the relationship it defines between the subjects of law, their acts and the community to which they belong.

This explains why it is not surprising that presently we see a real evolution of international responsibility (which does not necessarily imply that the international legal system is in crisis, if one sees here a pathological meaning). It explains also why the task of scholars cannot be restricted to a purely empirical commentary on each one of the new regimes of responsibility (or "liability") which are appearing, without trying at the same time to perceive them in relation to their structural significance. Thus, although the contemporary institutions and regimes of a strict international liability and of an international "criminal" responsibility appear distinct, they both proceed from a common origin: the classical legal regime of international responsibility of states as it was generally understood only a little more than two decades ago and as it still seems predominantly understood in the decisions of the I.C.J. and arbitral tribunals.\(^2\)

Observing the general evolution of the law of state responsibility since the beginning of this century, it is most striking to observe that it has gone through different stages of objectivization, while the core ele-

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\(^{2}\) See supra notes 23 & 59.
ments of the theory of international responsibility have remained the same.

The first step was taken, as mentioned above, by eliminating all reference to the subjective and psychological dimensions of "fault," and replacing it with the notion of wrongful act as the origin of responsibility. Then, as a second step, an attempt was made by some authors, to objectivize completely the state's fact-creating responsibility, by eliminating, in relation to some sovereign activities, any necessity of proving the wrongful character of the act. Thus, responsibility was reduced to a pure liability. A few years later, a third step was taken, though in the opposite direction; namely, that of "overqualification" of the fact at the origin of responsibility, designated there as a "crime" in view of the particular importance of the obligation thus breached. In this new context, what is objectivized is no longer the fact at the origin of a primary obligation to make reparations, but the right or interest awarded to the states other than those individually effected, to act in view of reestablishing legality.

Comparing these two contemporary and contradictory trends, which, as such, do not seem to have definitively penetrated into the sphere of positive international law, one should notice both their profound differentiation as well as their common origin in the classical law of international responsibility. One is entirely aimed at extending the ordinary function of responsibility, i.e. reparation. In this respect, material damage is for it of essential importance; it emphasizes the obligation of the origin State of the harmful activity. The second, on the contrary, has as its essential purpose the restoration of legality. Material damage is superfluous; it focuses on the rights of the victim States (both the subjectively and the objectively affected ones) much more than on the duties of the responsible "criminal" State. Nevertheless, in both cases, the link with some of the characters of the common matrix (namely the classical theory of state responsibility) is real if not always self-evident.

International liability, then, must not be seen as a "liability for activities not prohibited by international law," since the lawfulness of an activity depends very much on the way it is carried out and on the increasing presence of obligations of due diligence which are established under the cover of a general obligation of cooperation, particularly in the field of hazardous activities and harmless use of territory. The foundation or legal basis of this regime, then, at least in general customary law, is the commitment of a wrongful act, the proof of which may no longer be the burden of the victim state, in cases when
presumptions of responsibility could be used, thanks to the existence of sufficiently well-defined international standards.

As for the responsibility for international crimes, it proceeds from the distinction which already exists in the law of state responsibility between reparation of the material damage and restoration of the legality, by emphasizing the second, which could then be demanded by every state since it concerns the respect of "community obligations" ("obligationes omnium et erga omnes").

Thus, in each case, it seems a little too early to proclaim the death of the unity of international responsibility and its disintegration into several distinct and fully autonomous regimes, even if, from some point of view, such an evolution may appear desirable.