General Assembly Sixth Committee

Topic B: Responsibility of States for Wrongful Acts

“[I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation” -- Judge Roberto Ago

The doctrine of state responsibility is the concept that governs when and how a state is held responsible for a breach of an international obligation. Until recently, the theory of state responsibility was not particularly well developed. This position is considerably altered, with the passage of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts by the International Law Commission (ILC) in August 2001. Through a series of codified international standards, these articles help set the legal precedent for any Member State to be held accountable for their wrongful actions with a specific form of legal due process that is to follow soon thereafter. The articles’ content is not focused on the international obligations, but rather provides the necessary means in which if such obligations are breached, then this gives rise to responsibility. Although these articles enhance responsibility and the need for Member States to be held accountable for their actions, there are still a number of ambiguities within the Draft Articles that must be addressed by the international community.

Background:

History of State Responsibility and its Codification

Dating back to the early days of the United Nations, the concept of State responsibility began to appear within discussions as early as 1930 and continued to be of regular interest during the initial phases of development. During a session of the General Assembly in 1948, the Assembly voted to establish the International Law Commission (ILC), which was tasked with addressing the issue of State responsibility amongst a list of 14 other relevant topics. Under the direct supervision of the first Special Rapporteur F.V. Garcia Amador, the Commission began submitting reports in 1956-1961 that dealt specifically with State responsibility; however, reports that were submitted did not receive due attention by the Commission. But, by 1962, the ILC began to shift its attention towards defining “the general rules governing the international responsibility of the State;” the concept gained significant traction. The Italian professor Roberto Ago, by then the second Special Rapporteur drew upon previous reports and submitted his own versions (eight reports total) of State responsibility that the Commission later

2 Ibid.
3 Ibid.
incorporated between the years of 1969-1980. Over 35 articles now constitute the basis for the founding principles behind State responsibility and serves as Part One of the Articles on Responsibility of State for Internationally Wrongful Acts.

Throughout the late 1990s and early 2000s, the ILC under the direction of J. Crawford of Australia, the Commission subjected the Articles to a thorough review by the Commission as well as Member States who provided feedback to the ILC. Following this review, the fifty-third session of the General Assembly reorganized into a series of 59 draft Articles that the Assembly later ratified. In the subsequent years, the General Assembly recognized in Resolution 65/19 that some Member States prefer a conference to turn the Articles into a formal convention, while others contend that the Articles remain an ILC text and ultimately stand as an ad referendum by the General Assembly.

The Foundations of State Responsibility as “secondary rules”

Divided into four Parts, the Articles address the various behaviors and expectations from each Member State; with a total of nine chapters, the Articles set the basis for State Responsibility. With the work of previous Rapporteur Ago and other members of the ILC throughout the years following its inception, the rules on State Responsibility are described as “secondary rules,” because the Articles provide a general framework that sets forth individual State consequences for those Member States who breach any obligation set forth by the Articles or “primary rules” set forth by the ILC.

Breach of an International Obligation and its Consequences

If a Member State breaches any international obligation two forms of legal consequences may ensue. The first consequence created by the Articles is that new obligations are created for the breaching Member State that include the duty of cessation and non-repetition of the act while making arrangements for full reparation(s) (Articles 30 & 31). Such reparations or “secondary obligations” are owed to other Member States or to the international community as a whole as well as to non-state actors, individuals, or international organizations. Additionally, the Articles generate new rights for States that have been injured; the right to cite responsibility as well as a limited right to take actions into their own hands by enacting countermeasures. Such rights are implemented as a state-centered series of reparations and are not dealt with based on how State Responsibility is enacted if the right is at the individual level or that of an organization. According to Article 48, specific violations of international obligations have the capability to

4 Ibid. 
5 Ibid. 
inflict harm on the international community as a whole to a point in which State Responsibility has to be invoked for the betterment of the international community.\textsuperscript{7}

\textit{Attribution of the Act to the Injured Party & Potential Reparations}

Before any Member State is held accountable for any breach, there must be a link between the injured and the act or omission that the state is alleged to have committed against its obligations or commitments. The state is the sole responsible body for all of its internal entities, organs, and personnel who work on behalf of that particular state.\textsuperscript{8} Entities or persons who are not official representatives of the state are still accountable because they are given power to execute government authority to act in a given situation.\textsuperscript{9} Additionally, people or organs who are not acting on public functions are also equally responsible if they are proven to be under the auspices of the State.

Furthermore, if there is a government collapse or lack of official authority, those entities who are acting as the government in a de facto sense are considered acts of the state. Any movement that is insurrectionist in nature, that eventually becomes the new government of that state and establishes a government thereafter are held responsible. There is a level of concreteness to these codified Articles, but there is a level of ambiguity that is necessary for their existence; their application however, will designate that there be fact-finding inquiries and a determination if a breach did or did not occur.\textsuperscript{10} The state must cease all illegal actions if such actions are continuing. The state also must fulfill its duties by making reparations to any injured party; forms of reparations may include restitution, compensation, or satisfaction. Forums such as the United Nations, International Court of Justice, the World Trade Organization, International Tribunal for the Law of the Sea, International Criminal Court, and on the purpose of reparation.\textsuperscript{11}

\textbf{Current Issue:}

\textit{Determination of Fault in the Articles}

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\textsuperscript{7} Ibid.
\textsuperscript{8} ILC. “International Law Commission’s Articles on Responsibility of States for internationally wrongful acts, as adopted 2001.” Note 1 Art. 5
\textsuperscript{9} ILC. “International Law Commission’s Articles on Responsibility of States for internationally wrongful acts, as adopted 2001.” Note 1 Art. 9
\textsuperscript{10} ILC. “International Law Commission’s Articles on Responsibility of States for internationally wrongful acts, as adopted 2001.” Note 1 Art. 11
Chapter 1 of the Draft Articles, highlights the term of State Responsibility as the attribution to the Member State of conduct that inherently breaches its international obligations. Every breach invokes the responsibility of that state without specified elements such as fault or damage. The argument found in the current literature on this topic argues that specific primary rules of international law apply different standards of ‘due diligence’ to enforced liability; through such standards, they are able to bring about responsibility in the event that a breach occurs. The literature indicates that there is a general rule, principle, or presumption about the place of fault in relation to any given primary rule, since it depends on the interpretation of that rule in the light of its object or purpose. Critics and international law scholars contend that this should not be the case given that the functions of various areas within international law are grounded in state responsibility.

_Tying the State to its Conduct & Obligations of Conduct and Result_

Moreover, in Chapter 2 of the Draft Articles, Articles 11-14 and 15 examines the understanding of the ‘negative attribution’ articles and their effects towards State Responsibility. Critics argue that the Articles are an embodiment of a ‘very traditional’ Western conceptualization of the state and the public sector that essentially fails to account for the level of immersion that both the public and private spheres have as well as it is perception of an ideological preference for the public sphere. This criticism also stands as critique of the international law system itself as well as the framework of thought and application that sustains the state system.

Another important criticism that is relevant within the Articles is between the different kinds of obligations and terms associated with them identified in Chapter III. Specifically, the terms ‘obligation of conduct’ and ‘obligations of result’ continue to evolve and become widely accepted within the language of international law as a result of the earlier influences of the founding members of the ILC. However, many scholars, critics, and authorities in international law contend that such terms do not have consequences in the remaining Draft Articles. Articles 20-21 in the text identifies a direct reversal of the distinction between completed and continuing wrongful act as it is accepted within certain European legal systems. Accordingly, the founders of this system adhered to the understanding that obligations of result were less strict because the state had a discretion as to means which it did not originally have with regards to conduct and varying obligations. Within the international sphere, a state’s power to determine actions that it

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13 Ibid.

14 Ibid.

15 Ibid.

16 Ibid.
may or may not take is tantamount to its sovereignty, which is significantly hindered if it is forced to enact specified rules of conduct. 17

Responsibility to the International Community

The International Court ratified the case known as the Barcelona Traction that affirmed the necessary existence of State Responsibility in regards to the international community. During the formation of the Draft Articles, the terminology evolved into ‘international crimes of state.’ An inherent difficulty in promoting ‘international crimes’ as a relevant concept is that many of its supporters are hesitant to permit a full-scale regime that attempts to rectify punitive damages, but assign sanctions in the case of a known “criminal” state.18 Additionally, the usage of the term 'crime' further reduces efforts to a name calling game that will make those states with considerable power even more powerful; the Permanent Members of the Security Council have the potential to act as such or within their own individual capacity. Lastly, a general code of obligations according to the literature, should not embody the penal consequences of different criminal acts; if the term of “criminal” is used without procedures for the determination of criminal responsibility,19 then the term is not necessary.

Restitution vs. Compensation

Two examples that are often cited in the arguments for or against restitution and compensation are the Great Belt (Finland v. Denmark) and Breard (Breard v. Greene) cases of both Finland and Paraguay.20 Both cases addressed different questions. The case that Finland asserted in the Great Belt arose as a result of its argument for a specific right of passage, while Paraguay’s claim in Breard was a result from a failure of notification in relation to a procedure. The distinction between the two is that claims for restitution that follow a violation of incidental procedural rights raise different issues from cases where what is denied by the respondent state is the very subject matter of the international obligation.21 For Breard, in order for restitution to take place, the demonstration that the procedural failure produced consequences for both the verdict and sentence was a necessity. Problems between restitution and reparation proved to be a difficult situation in the Great Belt case; it highlights the debate as to whether or not an injured state has the right to pursue restitution, but is addressed in Article 43 of the Draft Articles and does no determine adequately whether that balance between restitution or compensation is flawed or defective.22

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17 Ibid.
18 Ibid.
19 Ibid.
21 Ibid.
22 Ibid
Future Outlook

During the sixty-eighth meeting of the General Assembly, the Sixth Committee determined that there are three actions that the body can take regarding the Draft Articles of the ILC. First, the international community could convene to negotiate a convention with the Articles serving as the basis for the convention. Proponents for a convention argue that a convention would add a level of legal certainty and the overall rule of international law. A convention would lower the selective and oftentimes inconsistent application of the articles under certain circumstances. Furthermore, delegations called for a diplomatic conference to adopt the articles as an international convention.

The other remaining actions for the future of State Responsibility was for Member States to support adoption of the Articles by the General Assembly in the form of a declaration or resolution and a retention of the Articles in their original form by the ILC with no further action needed. The reason behind the third argument for the Articles to remain the same as produce by the ILC is that further negotiations on a convention could harm or threaten the balance that exists between the current articles. Moreover, there is a widely accepted consensus that the Articles have proven their worth as a relevant source for courts and individual Member State governments. This is an argument for organic development instead of through constant negotiation and debate in a multilaterally based platform of discussion. The topic should be put aside until the time is appropriate for action.

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24 Ibid.

25 Ibid.
Focus Questions

1. Is your state a proponent or opponent of the *Draft Articles*?
2. Has your state ever been subject to the rules regarding conduct in the *Draft Articles*? If so, what was the instance and its outcome?
3. What side does your state reside with concerning its responsibility to the International community?
4. Does your state agree with the notion of compensation or restitution for state conduct as outline in the *Draft Articles*?
5. Of the three scenarios (implementation of a convention, draft resolution, or leaving the Articles to be as they are) which position best describes your state’s policy stance towards the Articles’ future?
Works Cited


ILC. “International Law Commission’s Articles on Responsibility of States for internationally wrongful acts, as adopted 2001.” Note 1, Art. 5.

ILC. “International Law Commission’s Articles on Responsibility of States for internationally wrongful acts, as adopted 2001.” Note 1, Art. 9.

ILC. “International Law Commission’s Articles on Responsibility of States for internationally wrongful acts, as adopted 2001.” Note 1, Art. 11.
