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State Responsibility And International Liability Under International Law

SOMPONG SUCHARITKUL*

I. INTRODUCTION

The International Law Commission (ILC) is actively studying two topics, namely, "State Responsibility"¹ and "International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law."² There appears to have been some confusion concerning these two topics. International liability, as a new topic, was carved out of the main theory of State responsibility. Both topics, however, deal with the obligations and duties incumbent upon States under international law. Differentiating between State responsibility and international liability of a State is conceptually difficult. Even though an act of a State may not be wrongful by virtue of consent,³ force majeure or fortuitous

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1. See *Report of the International Law Commission on the Work of Its Twenty-Seventh Session* ¶¶ 9-51, U.N. Doc. A/10010/Rev.1 (1975), reprinted in [1975] 2 Y.B. Int'l L. Comm'n 47, 51-59, U.N. Doc. A/CN.4/SER.A/1975/Add.1 [hereinafter *Twenty-Seventh ILC Session Report*]; *Report of the International Law Commission on the Work of Its Thirty-Second Session* ¶¶ 26-33, U.N. Doc. A/35/10 (1980), reprinted in [1980] 2 Y.B. Int'l L. Comm'n pt. 2, at 1, 26-30, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) [hereinafter *Thirty-Second ILC Session Report*].

2. See *Report of the International Law Commission on the Work of Its Thirtieth Session* ¶¶ 170-178, U.N. Doc. A/33/10 (1978), reprinted in [1978] 2 Y.B. Int'l L. Comm'n pt. 2, at 1, 149-52, U.N. Doc. A/CN.4/SER.A/1978/Add.1 (Part 2) [hereinafter *Thirtieth ILC Session Report*]; Robert Q. Quentin-Baxter, *Preliminary Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/334 & Add.1 & 2 (1980), reprinted in [1980] 2 Y.B. Int'l L. Comm'n pt.1, at 247, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1).

3. Draft Articles on State Responsibility, art. 29, in *Thirty-Second ILC Session Report*, *supra* note 1, at 30, 33 [hereinafter *Draft Articles*].

event,⁴ distress,⁵ or necessity,⁶ the absence of a wrongful act does not prejudice the question of compensation for damage caused by that act.⁷ The State may engage its international liability and compensate for damage caused by its act, regardless of the existence of a wrongful act.⁸ In more ways than one, a State's international liability constitutes proof of injurious consequences independent of a wrongful act attributable to that State.

Linguistic deficiency in non-English languages to differentiate between "responsibility" and "liability" further compounds the difficulty in distinguishing between State responsibility and States' international liability. Civil law vocabularies express the notion of "liability" in terms of "responsibility" or "civil responsibility." Thus, "State responsibility" refers to a State's responsibility under international law in general, whereas "international liability" denotes a State's "civil responsibility," or obligation to pay compensation or make reparations for injuries that non-nationals suffer outside its national boundaries as a result of activities within its territory or under its control. A State's international liability is engaged not only under international law, but also within the national dimension of municipal legal systems in circumstances involving transnational relations.

This Article assesses the relation between State responsibility under international law and international liability of States for injurious consequences that arise out of activities within their jurisdiction or control and that affect other States or nationals of other States. Part II examines the historical developments of State responsibility and international liability. Part III compares and contrasts elements of State responsibility and international liability. Part IV concludes that further study and development of State responsibility and international liability should be continued and encouraged.

II. HISTORICAL DEVELOPMENTS

It is not unnatural that legal principles have developed through historical accidents. International norms continue to evolve in

4. *Id.* art. 31.

5. *Id.* art. 32.

6. *Id.* art. 33.

7. *Id.* art. 35.

8. *Id.*

response to exigencies of the time, including legal norms regarding State responsibility and international liability. The origins and historical developments of these norms disclose instances where their evolutionary paths have crossed, intersected and coincided.

A. State Responsibility

“State responsibility” was originally conceived as a set of international rules governing States’ international obligations in their relations with other States. A State’s primary obligation is to pay compensation or make reparation for injuries suffered by nationals of other States. In traditional international law, State responsibility constituted a classic way of dealing with violations of customary international law.⁹ From an injured State’s point of view, State responsibility represented the State’s power to protect its citizens outside its national boundaries or a State’s exercise of its right and duty to do so. A State was traditionally empowered to extend its diplomatic protection to its citizens or nationals wherever they might be located, including another State’s territory. This aspect of customary international law was known as “diplomatic protection of citizens abroad.”¹⁰ Conversely, a State’s exercise of diplomatic protection vis-à-vis an offending State was predicated upon the offending State’s failure to meet the minimum international standard for “the treatment of aliens.”¹¹ In other words, the injured State was exercising its power of diplomatic protection to demand compensation or reparation for personal injuries, including loss of life; economic or financial injuries, including loss of property or assets; and property damages, including loss of investments, expropriation, nationalization and requisition or confiscation of property belonging to foreigners.¹²

The term “diplomatic protection” was never confined to diplo-

9. “International law” is defined as “[t]hose laws governing the legal relations between nations.” BLACK’S LAW DICTIONARY 816 (6th ed. 1990).

10. Vattel, in his classic work *Le Droit Des Geus*, defined diplomatic protection as “quicon fue maltraite un citozen offense indirectement l’etat, qui doik proteger ce citozen.” VATTEL, *LE DROIT DES GEUS* 71 (1758); see also C.F. AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW* 53 (1990). For an earlier report on diplomatic protection see E.M. Borchard, *Rapport sur la Protection Diplomatique Des Nationaux a L’Efiangu* 38 ANNIESE DE L’INSTITUTE DE DROIT INTERNATIONAL 256, 256-455 (1931).

11. See Borchard, *supra* note 10.

12. In the absence of specific treaty obligations, the power of a state to protect its citizens abroad is based on customary international law, as pointed out in *Hines v. Davidowitz*, 312 U.S. 52 (1941).

macy or recourse to diplomatic channels to negotiate a settlement of international claims. Rather, the adjective "diplomatic" referred to the "governmental" level of protection, which could encompass any means adopted by the injured State. Thus, under traditional international law, a State could use force to compel payment of debts that another State owed to one of its nationals, either natural or juridical persons, such as corporations or enterprises. A State's collection of private debts from another State was prevalent in the Western Hemisphere until the Hague Peace Conferences in 1899 and 1907. Following the close of World War I, States ultimately denounced the use of force or war as an instrument of national policy.¹³

Indeed, for some States, notably the United States, the law of State responsibility essentially meant responsibility for injuries to aliens as well as diplomatic protection of citizens abroad. In its initial stages, State responsibility not only was considered to constitute the major component of international law, but also was regarded as the exclusive domain of the law of nations. In its primitive stages, international law had condoned the use of force to enforce payment of compensation or repayment of loans, even in the international arena. The practice of European and Inter-American states abounded with dispute settlements relating to injuries suffered by aliens and mixed claims commissions, as well as other types of international arbitration, conciliation and mediation, including good offices and fact-finding missions.¹⁴

Personal injuries and economic losses suffered by aliens were initially recoverable through unrestricted resort to local remedies. Soon thereafter, the Exhaustion of the Local Remedies Rule developed, which required the exhaustion of local remedies before the injured State could espouse or take up its nationals' claims against another State.¹⁵ This requirement formed an integral part of the

13. The League of Nations was formed following the end of World War I. The Covenant of the League of Nations, concluded in 1919, did not abolish war, but rather placed limitations upon the use of force. Covenant of the League of Nations, June 17, 1919, 22 U.S.T. 3410, 94 L.N.T.S. 57.

14. See *Mavromatis Palestine Concession Case* (Greece v. U.K.), 1924, P.C.I.J. (ser. A) No. 2, at 12 (Mar. 3); *Chorzow Factory Case* (Germany v. Pol.), 1928, P.C.I.J. (ser. A) No. 17, at 47.

15. See *Interhandel* (Switz. v. U.S.), 1957 I.C.J. 105 (Interim Protection Order of Oct. 24); *Ambatielos Claim* (Greece v. U.K.), 23 I.L.R. 306 (Arb. Comm'n 1956); *Anglo-Iranian Oil Co.* (U.K. v. Iran), 1951 I.C.J. 89 (Interim Protection Order of July 5), 1952 I.C.J. 93 (Preliminary Objection of July 22). Compare with Draft Articles, *supra* note 3, art. 22.

law of State responsibility for injuries to aliens.

In 1929, the Harvard Research in International Law prepared a draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners (1929 Draft Convention).¹⁶ A subsequent Draft Convention on the International Responsibility of States for Injuries to Aliens (1961 Draft Convention) revised the 1929 Draft Convention.¹⁷

According to the 1929 Draft Convention, "[a] State is responsible, when it has a duty to make reparation to another State for the injury sustained by the latter State as a consequence of an injury to its national."¹⁸ The 1929 Draft Convention prescribed some general principles and defined the circumstances in which a State is responsible for injury. In 1927, the Institute of International Law adopted a resolution on the same topic, stating that "[a] State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations."¹⁹ The 1961 Draft Convention likewise stipulated that "[a] State is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that State, and causes an injury to an alien."²⁰ Thus, in their attempts to codify the law of State responsibility, the Harvard Research in International Law and the Institute of International Law concentrated on the international rules regarding violation of a primary international obligation, giving rise to a secondary obligation to make reparation for aliens' injuries.

Meanwhile, the U.N. General Assembly decided in 1953 that "it is desirable for the maintenance and development of peaceful relations between States that the principles of international law governing State responsibility be codified."²¹ From 1956 to 1961,

16. Research in International Law, Harvard Law School, Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, *reprinted in* 23 AM. J. INT'L L. 133 (Special Supp. 1929) [hereinafter 1929 Draft Convention].

17. Draft Convention on the International Responsibility of States for Injuries to Aliens, *reprinted in* Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 548 (1961) [hereinafter 1961 Draft Convention].

18. 1929 Draft Convention, *supra* note 16, art. 1.

19. International Responsibility of States for Injuries on Their Territory to the Person or Property of Foreigners, *reprinted in* 22 AM. J. INT'L L. 330 (Special Supp. 1928).

20. 1961 Draft Convention, *supra* note 17, art. 1, para. 1.

21. G.A. Res. 799, U.N. GAOR 6th Comm., 8th Sess., Supp. No. 17, at 52, U.N. Doc. A/2630 (1953).

Dr. F.V. Garcia-Amador, the first U.N. Special Rapporteur, submitted six reports on various aspects of State responsibility.²² Dr. Garcia-Amador noticed a trend in the various drafts proposed by the developed world toward excessive protection of advanced countries' economic interests in the exploitation of developing countries' natural resources and raw materials. A compromise was suggested, whereby a minimum human rights standard would govern the international treatment of aliens and nationals. In other words, a minimum human rights standard or guarantee against racial discrimination should be included as a counterpart to the required international standard of treatment of foreigners. Any endeavor to enforce such a minimum standard or guarantee, however, was doomed to failure, considering strong opposition from the West, which regarded a minimum standard as interference in its domestic affairs.

Judge Roberto Ago, the second Special Rapporteur, presented the second generation of reports, which followed the general plan adopted by the ILC in 1975. This plan envisaged the following structure for the draft articles: Part One concerning the origin of international responsibility; Part Two reviewing the content, forms and degrees of international responsibility; and a possible Part Three discussing the settlement of disputes and the implementation (*mise en oeuvre*) of international responsibility.²³ In 1980, the ILC provisionally adopted, on first reading, Part One of the draft articles, containing thirty-five articles on "the origin of international responsibility." Part One was divided into five Chapters: General Principles; The "Act of the State" under International Law; Breach of an International Obligation; Implication of a State in the

22. F.V. Garcia Amador, *International Responsibility: Report*, U.N. Doc. A/CN.4/96 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 173, U.N. Doc. A/CN.4/SER.A/19-56/Add.1; F.V. Garcia Amador, *International Responsibility: Second Report*, U.N. Doc. A/CN.4/106 (1957), reprinted in [1957] 2 Y.B. Int'l L. Comm'n 104, U.N. Doc. A/CN.4/SER.A/1957/Add.1; F.V. Garcia Amador, *International Responsibility: Third Report*, U.N. Doc. A/CN.4/111 (1958), reprinted in [1958] 2 Y.B. Int'l L. Comm'n 47, U.N. Doc. A/CN.4/SER.A/1958/Add.1; F.V. Garcia Amador, *International Responsibility: Fourth Report*, U.N. Doc. A/CN.4/119 (1959), reprinted in [1959] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1959/Add.1; F.V. Garcia Amador, *International Responsibility: Fifth Report*, U.N. Doc. A/CN.4/125 (1960), reprinted in [1960] 2 Y.B. Int'l L. Comm'n 41, U.N. Doc. A/CN.4/SER.A/1960/Add.1; F.V. Garcia Amador, *International Responsibility: Sixth Report*, U.N. Doc. A/CN.4/134 (1961), reprinted in [1961] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1961/Add.1.

23. *Twenty-Seventh ILC Session Report*, supra note 1, ¶¶ 38-51, at 55-59.

Internationally Wrongful Act of Another State; and Circumstances Precluding Wrongfulness.²⁴

Following Judge Ago's election to the International Court of Justice (ICJ), the U.N. appointed a third Special Rapporteur, Professor Willem Riphagen. From 1980 to 1986, he presented a series of seven reports with reference to Parts Two and Three of the draft articles.²⁵ In 1986, the ILC provisionally adopted draft articles 1 to 5 of Part Two.²⁶

In 1987, the U.N. appointed Professor Gaetano Arangio-Ruiz the fourth and current Special Rapporteur on the topic of State responsibility. He began submitting reports to the ILC in 1987.²⁷ Since 1988, the ILC has considered several reports and has referred draft articles to the Drafting Committee.²⁸

24. *Thirty-Second ILC Session Report*, *supra* note 1, ¶¶ 17-34, at 26-62.

25. William Riphagen, *Preliminary Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles on State Responsibility)*, U.N. Doc A/CN.4/330 (1980), *reprinted in* [1980] 2 Y.B. Int'l L. Comm'n pt. 1, at 107, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1); Willem Riphagen, *Second Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)*, U.N. Doc A/CN.4/344 (1981), *reprinted in* [1981] 2 Y.B. Int'l L. Comm'n pt. 1, at 79, U.N. Doc. A/CN.4/SER.A/1981/Add.1 (Part 1); Willem Riphagen, *Third Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)*, U.N. Doc A/CN.4/354 & Add.1 & 2 (1982), *reprinted in* [1982] 2 Y.B. Int'l L. Comm'n pt. 1, at 22, U.N. Doc. A/CN.4/SER.A/1982/Add.1 (Part 1); Willem Riphagen, *Fourth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)*, U.N. Doc A/CN.4/366 & Add.1 (1983), *reprinted in* [1983] 2 Y.B. Int'l L. Comm'n pt. 1, at 3, U.N. Doc. A/CN.4/SER.A/1983/Add.1 (Part 1); Willem Riphagen, *Fifth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)*, U.N. Doc A/CN.4/380 (1984), *reprinted in* [1984] 2 Y.B. Int'l L. Comm'n pt. 1, at 1, U.N. Doc. A/CN.4/SER.A/1984/Add.1 (Part 1); Willem Riphagen, *Sixth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)*, U.N. Doc A/CN.4/389 (1985), *reprinted in* [1985] 2 Y.B. Int'l L. Comm'n pt. 1, at 3, U.N. Doc. A/CN.4/SER.A/1985/Add.1 (Part 1); Willem Riphagen, *Seventh Report on State Responsibility*, U.N. Doc A/CN.4/397 & Add.1 (1986), *reprinted in* [1986] 2 Y.B. Int'l L. Comm'n pt. 1, at 1, U.N. Doc. A/CN.4/SER.A/1986/Add.1 (Part 1).

26. *Report of the International Law Commission on the Work of Its Thirty-Eighth Session*, ¶ 38, U.N. Doc. A/41/10 (1986), *reprinted in* [1986] 2 Y.B. Int'l L. Comm'n pt. 2, at 1, 35, U.N. Doc. A/CN.4/SER.A/1986/Add.1 (Part 2). The five articles in Part Three and its Annex were referred to the Drafting Committee in 1986. *Id.* ¶ 63, at 38.

27. Gaetano Arangio-Ruiz, *Preliminary Report on State Responsibility*, U.N. Doc. A/CN.4/416 & Add.1 (1988), *reprinted in* [1988] 2 Y.B. Int'l L. Comm'n pt. 1, at 6, U.N. Doc. A/CN.4/SER.A/1988/Add.1 (Part 1).

28. For the text of articles 6 and 7, see *Report of the International Law Commission on the Work of Its Forty-First Session* ¶¶ 229-230, U.N. Doc. A/44/10 (1989), *reprinted in* [1989] 2 Y.B. Int'l L. Comm'n pt. 2, at 1, 72-73, U.N. Doc. A/CN.4/SER.A/1989/Add.1 (Part 2). For the text of articles 8, 9 and 10, see *Report of the International Law Commission on the Work of Its Forty-Second Session* ¶¶ 344-407, U.N. Doc. A/45/10 (1990), *reprinted in*

Since 1975, the scope of State responsibility law has expanded far beyond the traditional notion contained in the various draft conventions prepared by national and international institutions of higher learning, such as the Harvard Research in International Law and the Institute of International Law. State responsibility has even expanded beyond the notion contained in the first generation of reports submitted by Dr. Garcia-Amador. The current notion of State responsibility is a comprehensive regime of the law of obligations, covering general principles of States' international responsibility, including primary rules that establish all types of internationally wrongful acts attributable to a State and secondary rules that flow as a legal consequence from a State's breach of an international obligation, regardless of its origin.

Thus, as a topic for codification, State responsibility has progressed over time. From the notion of a special regime of State responsibility for injuries suffered by aliens on a State's territory, State responsibility has evolved into a comprehensive system of international responsibility of a State, regardless of whether aliens or individuals are involved and regardless of injuries.

B. International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law

As conceived by the ILC, "international liability" evolved from article 35 of the draft articles on State responsibility. International liability is based on the proposition that absence of wrongfulness does not prejudice the question of compensation for damage caused by an act of a State.²⁹ The liability of a State does not stem from its fault or the wrongfulness of its act, but from the injurious consequences suffered by persons beyond its boundaries.³⁰ The origin of international liability is traceable to Roman law and common law, as evidenced by the Latin maxim: *sic utere tuo ut alienum non*

[1990] 2 Y.B. Int'l L. Comm'n pt. 2, at 1, 71-81 & nn.271, 289 & 291, U.N. Doc. A/CN.4/SER.A/1990/Add.1 (Part 2). See *Report of the International Law Commission on the Work of Its Forty-Third Session* ¶¶ 308-322, U.N. Doc. A/46/10 (1991), reprinted in [1991] 2 Y.B. Int'l L. Comm'n pt. 2, at 1, 127-29, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2); *Report of the International Law Commission on the Work of Its Forty-Fourth Session* ¶¶ 112-276, U.N. Doc. A/47/10 (1992), reprinted in [1992] 2 Y.B. Int'l L. Comm'n pt. 2, at 1, 18-41, U.N. Doc. A/CN.4/SER.A/1992/Add.1 (Part 2).

29. See generally *Report of the International Law Commission on the Work of Its Thirty-Seventh Session* ¶¶ 108-163, U.N. Doc. A/40/10 (1985), reprinted in [1985] 2 Y.B. Int'l L. Comm'n pt. 2, at 19-27, U.N. Doc. A/CN.4/SER.A/1985/Add.1 (Part 2).

30. See generally *id.*

laedas, which means "use your property in such a way as not to harm others."³¹ This concept of liability is based on restrictive enjoyment of one's own property, or limited and regulated use of proprietary rights subject to the prevention of harm to one's neighbors.

The theory of international liability finds expression in State practice, as exemplified in the *Trail Smelter Case*,³² the *Lake Lanoux Arbitration*,³³ the *Corfu Channel Case*,³⁴ and the *Settlement of Gut Dam Claims*.³⁵ In these cases, the primary rule, which provides that a State must refrain from harming its neighbors, received further application with far wider implications. A State must not only refrain from harming or hurting neighboring States, it must also prevent harm in the territories of neighboring States.

The ILC has specified the obligations of every State in its sovereign right and in the exploration and exploitation of its natural resources. Moreover, the ILC has attempted to conceptualize and circumscribe the rules on international liability for injurious consequences arising out of acts not prohibited by international law.³⁶ In 1978, the ILC appointed Professor Robert Q. Quentin-Baxter the first Special Rapporteur. Between 1980 and 1984, Professor Quentin-Baxter submitted five reports on international liability to the ILC.³⁷ The ILC also reviewed a study

31. BLACKS LAW DICTIONARY 1380 (6th ed. 1990).

32. *Trail Smelter Case* (U.S. v. Can.), 3 R.I.A.A. 1905 (Trail Smelter Arb. Trib. 1938 & 1941).

33. *Lake Lanoux Arbitration* (Fr. v. Spain), 24 I.L.R. 101 (Arb. Trib. 1957).

34. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Merits Apr. 9). The ICJ held Albania responsible because "nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve[d] the international responsibility of Albania." *Id.* at 23. Albania's responsibility was based on its failure to warn ships near the danger zone. *Id.* The ICJ reserved the assessment of compensation for a separate judgment. *Id.* at 26, 36.

35. *Settlement of Gut Dam Claims* (U.S. v. Can.), 8 I.L.M. 118 (Lake Ontario Claims Trib. 1969).

36. See *Thirtieth ILC Session Report*, *supra* note 2.

37. Quentin-Baxter, *supra* note 2; Robert Q. Quentin-Baxter, *Second Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/346 & Add.1 & Add.2 (1981), reprinted in [1981] 2 Y.B. Int'l L. Comm'n pt. 1, at 103, U.N. Doc. A/CN.4/SER.A/1981/Add.1 (Part 1); Robert Q. Quentin-Baxter, *Third Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/360 (1982), reprinted in [1982] 2 Y.B. Int'l L. Comm'n pt. 1, at 51, U.N. Doc. A/CN.4/SER.A/1982/Add.1 (Part 1); Robert Q. Quentin-Baxter, *Fourth Report on International Liability for*

prepared by the Secretariat that surveyed State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law.³⁸

Following the untimely death of Professor Quentin-Baxter, the ILC appointed Ambassador Julio Barboza the second Special Rapporteur. From 1985 to 1992, the ILC received no fewer than seven reports from the second Special Rapporteur.³⁹

Currently, the ILC is considering succeeding reports from the Special Rapporteurs. An open-ended working group, which was established in 1992 to consider general issues relating to the scope of liability, may exemplify the future direction of work on the topic of international liability.⁴⁰ Although the ILC has identified the

Injurious Consequences Arising out of Acts Not Prohibited by International Law, U.N. Doc. A/CN.4/373 (1983), reprinted in [1983] 2 Y.B. Int'l L. Comm'n pt. 1, at 201, U.N. Doc. A/CN.4/SER.A/1983/Add.1 (Part 1); Robert Q. Quentin-Baxter, *Fifth Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/383 (1984), reprinted in [1984] 2 Y.B. Int'l L. Comm'n pt. 1, at 155, U.N. Doc. A/CN.4/SER.A/1984/Add.1 (Part 1).

38. *Replies Received in Response to the Questionnaire Prepared by the Special Rapporteur with the Assistance of the Secretariat*, U.N. Doc. A/CN.4/378 (1984), reprinted in [1984] 2 Y.B. Int'l L. Comm'n pt. 2, at 129, U.N. Doc. A/CN.4/SER.A/1984/Add.1 (Part 1).

39. Julio Barboza, *Preliminary Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/394 (1985), reprinted in [1985] 2 Y.B. Int'l L. Comm'n pt. 1, at 97, U.N. Doc. A/CN.4/SER.A/1985/Add.1 (Part 1); Julio Barboza, *Second Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/402 (1986), reprinted in [1986] 2 Y.B. Int'l L. Comm'n pt. 1, at 145, U.N. Doc. A/CN.4/SER.A/1986/Add.1 (Part 1); Julio Barboza, *Third Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/405 (1987), reprinted in [1987] 2 Y.B. Int'l L. Comm'n pt. 1, at 47, U.N. Doc. A/CN.4/SER.A/1987/Add.1 (Part 1); Julio Barboza, *Fourth Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/413 (1988), reprinted in [1988] 2 Y.B. Int'l L. Comm'n pt. 1, at 251, U.N. Doc. A/CN.4/SER.A/1988/Add.1 (Part 1); Julio Barboza, *Fifth Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/423 (1989), reprinted in [1989] 2 Y.B. Int'l L. Comm'n pt. 1, at 138, U.N. Doc. A/CN.4/SER.A/1989/Add.1 (Part 1); Julio Barboza, *Sixth Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/428 (1990), reprinted in [1990] 2 Y.B. Int'l L. Comm'n pt. 1, at 83, U.N. Doc. A/CN.4/SER.A/1990/Add.1 (Part 1); Julio Barboza, *Seventh Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, U.N. Doc. A/CN.4/437 (1991), reprinted in [1991] 2 Y.B. Int'l L. Comm'n pt. 1, at 71, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 1).

40. *See Report of the International Law Commission on the Work of Its Forty-Forth Session*, ¶¶ 112-276, U.N. Doc. A/47/10 (1992), reprinted in [1992] 2 Y.B. Int'l L. Comm'n pt. 2, at 1, 18-41, U.N. Doc. A/CN.4/SER.A/1992/Add.1 (part 2).

broad area and outer limits covered by this issue, it has not yet made a final decision regarding the draft rules on international obligations of States. The rules appear to favor a strict doctrine of international liability of States accompanied by the primary duty to undertake precautionary measures that are consistent with the obligation to prevent harm.⁴¹

The topic of international liability has developed into specialized regimes of strict or even absolute liability. For example, an international fund was created to cover expenses for cleaning up environmental pollution and for compensating individuals for personal losses and injuries.⁴² Using this fund, international agencies were established to organize, manage and regulate procedures that ensure the safety and security of the international community in various fields of human endeavors and activities, such as maritime transport, oil pollution, marine environment, resource-sharing and long-range transboundary air pollution.⁴³

Similar to State responsibility, which began as a set of primary rules regulating State responsibility for injuries to aliens, international liability prescribes a set of primary rules. In particular, these rules cover situations where the State fails to prevent harmful effects or fails to give necessary warning to avoid and abate such effects. Unlike State responsibility, however, international liability continues to be concerned only with primary rules, while the expanded scope of State responsibility has evolved to deal with breaches of such primary rules or obligations already subsisting in international law, regardless of origin.

Thus, the topics of State responsibility and international liability, which began as primary rules and primary obligations, continue to cross from time to time. This overlap necessitates occasional comments on the relevance of their mutual relations.

III. ANALYTICAL EXAMINATION

An analysis of the elements of "State responsibility" and "international liability" may further clarify the similarities and

41. *Id.* The Commission concentrated on preventive measures and alternatives for activities to prevent harm. The Commission focused much less on remedial measures compared to the need to prevent the occurrence of harm.

42. *See e.g.* Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, Dec. 29, 1972, 11 I.L.M. 1291.

43. *See e.g.*, Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 834 U.N.T.S. 17, 46.

differences pertinent to the two topics.

A. *The Nature of International Law Rules*

Two precepts may be drawn from the examination of the origins and historical developments of State responsibility and international liability. First, State responsibility constitutes a comprehensive part of international law. It embraces all aspects of obligations incumbent upon States vis-à-vis other States, whether voluntarily contracted or imposed by custom, including the general principle that an internationally wrongful act engaging State responsibility has international legal consequences. Second, international liability is predicated on a set of primary rules concerning the primary obligations of States. Thus, the breach of a primary obligation under international liability inevitably sets in motion the secondary rules prescribed under State responsibility. The obligation not to cause harm to others, or its broader version, the obligation to prevent harmful effects to others, would be a primary rule of international liability, a breach of which engages State responsibility.

Under international liability, however, international conventions and multilateral treaties have created specialized regimes of implementation of secondary rights and obligations in several areas. Just as the 1969 Vienna Convention on the Law of Treaties sets forth the legal consequences of a treaty obligation breach,⁴⁴ a set of draft articles on international liability may also create a residuary general regime with provisions for implementing secondary obligations. These provisions may be consistent with, but contain detailed regulations different from, the implementation rules provided in the draft articles on State responsibility. In the absence of any special arrangements, the international liability draft articles may contain stricter rules of liability and more flexible criteria of attributability or imputation. Under these draft articles, the provisions would always operate as the residual secondary rules.

Despite the presupposition of primary rules and primary obligations in State responsibility, the rules and obligations elaborated under international liability constitute the same precise primary rules and obligations. Yet, State responsibility left these

44. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 8 I.L.M. 679 (entered into force Jan. 27, 1980).

rules and obligations untouched. Under State responsibility, the breach of primary rules and obligations results in the application of secondary rules in State responsibility. On the other hand, under international liability, a breach will generate secondary obligations that must be fulfilled under the law of State responsibility. These obligations include taking measures *ex nunc*, *ex tunc* and *ex ante*, cessation of wrongful acts or harmful effects, restitution or reparation, and satisfaction or adoption of precautionary measures to prevent repetition of the harmful effects or the injurious consequences of activities, regardless of consistency with international law.

B. *The Relevance of Wrongfulness*

The general rule of State responsibility requires the existence, by commission or omission, of an internationally wrongful act, whereas international liability exists regardless of unlawfulness or prohibition by international law. Article 35 of the draft articles on State responsibility, however, has paved the way to reconciling the law of State responsibility with the law of international liability.⁴⁵ Although articles 29, 31, 32 and 33 of the draft articles preclude wrongfulness of the act of a State, the absence of wrongfulness does not prejudice the obligation to compensate for damage caused by that act.⁴⁶ Thus, the obligation to compensate in the absence of wrongfulness is not inconsistent with the law of State responsibility. Special requirements imposed to prevent future harms also would not be inconsistent with the law of State responsibility. Therefore, wrongfulness may be an element of State responsibility. There are exceptions, however, to this general proposition. For instance, absence of wrongfulness does not preclude the application of some aspects of the secondary rules, which impose an obligation to compensate for the suffered loss, damage or harm.

The relevance of wrongfulness is relatively insignificant in the context of absolute and strict liability because the basis for international liability is the existence of injurious consequences or harm. The continuing evolution of international law reflects the relative insignificance of the wrongfulness requirement. What was not prohibited yesterday may be prohibited tomorrow, and what was

45. Draft Articles, *supra* note 3, art. 35.

46. *Id.*

prohibited today may not be prohibited tomorrow. The bottom line for international liability is that a State is liable for the harmful effects of activities under its control or within its jurisdiction. The control or exercise of jurisdiction by a State gives rise to its liability, irrespective of whether international law or the law of nations permits or prohibits the activities in question.

The law of international liability, which disregards wrongfulness, also opens the way for international law to evolve and develop its proscriptive rules. These rules evolve without prejudice to the obligation of the State to compensate for harmful consequences or to prevent, avoid and abate all injurious consequences to others. In this fashion, the moving frontier of international law progresses.

C. The Relative Irrelevance of Damage or Injury

Injury or damage is not an element of State responsibility. It is sufficient to establish the existence of an internationally wrongful act attributable to a State. Although the gravity of damage or the seriousness of injury may be a relevant factor in assessing compensation to be awarded to the injured State, it is not relevant to the establishment of State responsibility.

On the other hand, under international liability, there is no breach of a primary obligation if no appreciable harm or injurious consequence results from activities that a State either permits, condones or fails to prevent. An appreciable harm or injurious consequence is necessary to establish a violation of the duty not to cause harm or a breach of the primary obligation to prevent harm.

There has been a shift in emphasis from a wrongfulness requirement under State responsibility to a total disregard of lawfulness under international liability. Similarly, there has been a shift in relevance from the absence of any injury requirement under State responsibility to the necessity of at least an appreciable harm or injurious consequence under international liability.

D. Differences in the Test of Attributability to the State of an Action or Omission

The draft articles on State responsibility demonstrate the importance of tracing the commission of an internationally wrongful act. For a State to be responsible, an act may be either an action or an omission and must be attributable to the State.

On the other hand, international liability of a State associated

with its obligation not to cause harm to other States requires no attributability of the act to the State. Indeed, there is no requirement of an act at all, let alone an internationally wrongful act. International liability arises out of injurious consequences which, according to the natural law of causation, must result from activities over which the State has or should have direct or indirect control or that lie within its jurisdiction. Usually, a State may be held internationally liable for harmful effects caused by activities occurring or emanating from within its territory. Therefore, liability of a State may be said to be strict or almost absolute, regardless of fault, intention or negligence, for activities within its jurisdiction or on a sea-going vessel or spacecraft carrying its flag or registered in its territory. A State may be held internationally liable if it failed to take necessary steps to preempt or abate a harm. This test of attributability is more negative or less positive, in the sense that the act in question need not be attributable to the State or any of its organs or agencies. Although not prohibited by international law, it is sufficient if the activities giving rise to the harm were nevertheless conducted within its territory or under its jurisdiction or control.

E. Breach of an Obligation to Prevent a Given Event

Four articles deal with types of international obligations incumbent upon a State: Article 20 (Obligation of Conduct);⁴⁷ Article 21 (Obligation of Result);⁴⁸ Article 22 (Exhaustion of Local Remedies);⁴⁹ and Article 23 (Obligation to Prevent a Given Event).⁵⁰ Article 23 provides that “[w]hen the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.”⁵¹ Article 23, therefore, refers to a special type of obligation of result, which is also intrinsically related to the States’ adoption of conduct—a mixed obligation of result and conduct.

In general, part I of the draft articles deals with general

47. *Id.* art. 20.

48. *Id.* art. 21.

49. *Id.* art. 22.

50. *Id.* art. 23.

51. *Id.*

principles and chapter III discusses the breach of an international obligation. Article 23 is part of chapter III and envisages cases of a breach of obligation to prevent a given event, such as the taking of accredited diplomats as hostages, the seizure of an accredited embassy or consulate, the assassination of a visiting dignitary, or the prevention of harm to another State.⁵²

Injurious consequences arising out of activities that are otherwise lawful within the territory of a State but whose harmful effects occur in a neighboring country should be prevented under international law. Such a situation is exemplified in the *Trail Smelter Case*,⁵³ which involved the diversion of water from the river in one territory into a lake bordering another State, possibly adversely affecting the flow of water, its quantity and quality. Other examples of this situation include the *Lake Lanoux Arbitration*⁵⁴ and the *Corfu Channel Case*,⁵⁵ which involved a failure on the part of a State to warn of imminent danger in an area within its jurisdiction that was normally safe for international navigation. Thus, international rules relating to international liability constitute the type of primary obligations envisaged in article 23.⁵⁶ Whenever a State breaches these obligations, another series of international rules on State responsibility apply, giving rise to a host of secondary obligations for the breaching State to fulfill.

F. Duality of International Obligations

In general, a State has an international obligation to another State, or a State must be discharged of its obligation vis-à-vis another State. A State also owes obligations to the whole world or to all alike, *obligationes erga omnes*.⁵⁷ Such obligations include the maintenance of the minimum human rights standard, the non-

52. These examples have been taken from actual occurrences such as the assassination of visiting Korean leaders in Rangoon or the classic assassination of Archduke Ferdinand in Sarajevo, which triggered World War I and the deaths of 20 million people.

53. *Trail Smelter Case* (U.S. v. Can.), 3 R.I.A.A. 1905 (Trail Smelter Arb. Trib. 1938 & 1941).

54. *Lake Lanoux Arbitration* (Fr. v. Spain), 24 I.L.R. 101 (Arb. Trib. 1957).

55. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Merits Apr. 9).

56. Draft Articles, *supra* note 3, art. 23.

57. The International Court of Justice has refereed to *obligationes erga omnes* as obligations of a State to afford protection of its laws to foreign investment or foreign nationals. These obligations, however, are neither absolute nor unqualified, but are of concern to all States. *Barcelona Traction, Light and Power Company Limited* (Belg. v. Spain) ¶¶ 33, 1970 I.C.J. 3, 32 (Feb. 5).

discriminatory treatment of all aliens, the cooperation with one's neighbors and the prevention of harms to an adjacent community. By their very nature, *obligationes erga omnes* are the concern of all States, and thus, all States may have a legal interest in their enforcement.⁵⁸

The existence of *obligationes erga omnes*, however, does not imply the availability of a right of action or *jus standi* for every State. *Actio popularis*,⁵⁹ or an action that any person may bring, on behalf of the government and himself, for violation of a penal statute, is not admitted in an international forum. Indeed, the ICJ distinguished between an obligation of a State to the international community as a whole and its obligations arising vis-à-vis other States in diplomatic protection⁶⁰ or air pollution.⁶¹ It is difficult to designate a State or anyone else to represent the international community. Examples closest to an *actio popularis* would be the U.N. General Assembly's requests for ICJ advisory opinions.

State responsibility, as originally conceived, represented an aspect of diplomatic protection. This protection covered two dimensions of victims: natural or juridical persons who suffered injuries inflicted by the territorial State and the victim State whose nationals suffered personal injury or economic loss. This particular aspect of State responsibility in its classical form related to the treatment of aliens and its minimum standard.⁶² Likewise, environmental damage suffered by neighboring States and their nationals as a result of the offending State's activities affects two dimensions of victims: the individuals exposed to harmful effects and the States whose nationals are the victims. The damage, injury or injurious consequences constitute the special or particular interest necessary to establish *locus standi* for the victim State.⁶³

Article 22 of the draft articles on State responsibility, which requires exhaustion of local remedies and implies the existence of

58. *Barcelona Traction, Light and Power Company, Limited* ¶ 33, 1970 I.C.J. at 32-33.

59. *Actio Populares* was known in Roman Law as a prosecution that any citizen could initiate. BLACK'S LAW DICTIONARY 29 (6th ed. 1990).

60. *Barcelona Traction, Light and Power Company, Limited* ¶¶ 33-35, 1970 I.C.J. at 32-33.

61. See for instance the Convention on Long-Range Transboundary Air Pollution (LRTAP), Mar. 25, 1979, U.N.T.S. 217 (entered into force Mar. 16, 1983).

62. See Borchard, *supra* note 11.

63. See, e.g., *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253 (Dec. 20); *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec. 20).

two-fold measures of redress, represents the injury to aliens.⁶⁴ The first dimension is reflected in the availability of local remedies under the law of the territorial State, and the second dimension is reflected in the ability of the injured or victim State to espouse the claims of its nationals under international law.

Similarly, State responsibility flowing from the international liability of a State or its breach of an obligation to prevent a given event has two dimensions: domestic remedies that normally do not exist and its international liability vis-à-vis the victim State.

Because no local remedies are readily available for injuries resulting from transboundary air pollution in the absence of a treaty regime, the victim State can only find a solution through negotiations, arbitration, conciliation or good offices. It may also pursue litigation at an international level.

In spite of Article 23 of the draft articles on State Responsibility,⁶⁵ international liability law may still settle claims by paying compensation either to the victim State or directly to the individual victims.⁶⁶

Two categories of cases, namely, diplomatic protection and international liability, relate to claims that could be settled under national law through local remedies or amicable settlement.

IV. CONCLUSION

State responsibility and international liability are closely related, if not intrinsically interconnected, topics. It has been difficult to completely sever international liability from State responsibility, despite the intensive process of investigation, deliberation and codification by international agencies, such as the International Law Commission and the Institute of International Law.

Pending consideration of these topics, which may take decades or longer before final completion and adoption, independent studies should be continued and encouraged to understand these subjects better. State responsibility, formerly confined to a narrow scope of injuries to aliens, will receive further studies and more thorough scrutiny. The topic now appears to be all-inclusive,

64. Draft Articles, *supra* note 3, art. 22.

65. *Id.* art. 23.

66. See Settlement of Gut Dam Claims (U.S. v. Can.), 8 I.L.M. 118 (Lake Ontario Claims Trib. 1969).

encompassing all aspects of international obligations, whether created by treaties or by custom, including obligations of conduct, obligations of results, and a mixture of both types of obligations.

Meanwhile, the formerly narrowest aspects of State responsibility have received attention from the international financial circles to provide further incentives and more exhaustive guarantees of foreign investments. These measures protect international investments against possible expropriation, nationalization, requisition or the taking of property. Further, these measures preempt or prevent expropriation without appropriate or adequate compensation, even under the new international economic order. Different groups of States, such as Group 77, the Group of 7, and the OECD,⁶⁷ have endeavored to assert their views on the international rule as it ought to be, *de lege ferenda*. Divergent views appear to have emerged with further efforts to converge them through various U.N. resolutions.⁶⁸ In the ultimate analysis, a more balanced set of rules may prevail through consensus or through gradual and progressive implementation by bilateral, regional and global conventions.

On the whole, breaches of all types of international obligations under State responsibility, which amount to delicts, torts, or crimes under international law, will continue to retain our attention in the future. The next century may portend a clearer picture of future progressive developments in international law on this topic. International liability also continues to grow with further redresses beyond restitution or payment of compensation. These redresses prevent harms to human beings and the environment whenever a State exercises its legitimate right to explore and exploit its natural resources.

67. See *Progress Report on the "Legal Framework" for the Treatment of Foreign Investment, April 1992*, 7 ICSID REV.—FOREIGN INVESTMENT L.J. 307 (1992).

68. See, e.g., G.A. Res. 626, U.N. GAOR 2d Comm., 7th Sess., Supp. No. 20, at 18, U.N. Doc. A/2361 (1952); G.A. Res. 1803, U.N. GAOR 2d Comm., 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962); G.A. Res. 2158, U.N. GAOR 2d Comm., 21st Sess., Supp. No. 16, at 29, U.N. Doc. A/6316 (1966); G.A. Res. 3171, U.N. GAOR 2d Comm., 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1974); G.A. Res. 3201, U.N. GAOR Ad Hoc Comm., 6th Special Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974); G.A. Res. 3281, U.N. GAOR 2d Comm., 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974); see also Resolution on the Institutional and Financial Arrangements for International Environmental Cooperation (Establishing UNEP), Dec. 15, 1972, 13 I.L.M. 234.