The State of State Responsibility - Comments

BOISSON DE CHAZOURNES, Laurence


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A major turning point, 2001 saw the conclusion of more than four decades of work by the UN International Law Commission (ILC) on the law of state responsibility. During its 53rd session, the Commission adopted in second reading a complete set of fifty-five draft articles; the work was "taken note of" by the UN General Assembly on December 12, 2001 in its Resolution 56/83.

The draft is undoubtedly a major achievement. However, it does not mean that all issues relating to this particularly complex area of international law are now settled. On the contrary, several aspects of the text are bound to raise questions; it is not clear whether state practice will eventually bring answers, much less when and how the questions will be answered.

The articles are characterized by substantive concepts that are a direct consequence of the concept of state responsibility put forward by Roberto Ago when he began working (and inspiring the Commission's work) on the topic. It is widely recognized that Ago's genius consisted of including in the regime of state responsibility elements that went beyond a strictly compensatory function, in order to ensure that state responsibility could contribute to the defense of legality in an international society of whose institutional weaknesses Ago was only too aware. He achieved this simply by founding international responsibility on the breach by a state of its international obligations, rather than on damage and fault, as is the case in most domestic legal orders. This is not to say that the compensatory function was disregarded in the articles (see in particular Articles 34 et seg.), but only that the primary emphasis was on the imperative of restoring international legality (see, e.g., Article 30 on cessation). Beyond this "objectivation" of state responsibility, the idea of using the institution of state responsibility to reinforce international legality entailed other consequences.

One of these consequences is that the objective of restoring legality in a decentralized international society calls for proper devices. This explains the reappraisal in this context of what used to be termed "reprisals." The traditional concept is not overlooked, even though the terminology has changed; hence, countermeasures are first of all envisaged as a circumstance precluding wrongfulness, allowing a state to avoid certain of its obligations to another state by reason of a prior breach by the latter of its own obligations (Art. 22). But countermeasures are also considered in the articles as essential to implementing the international responsibility of a state (see Chapter II of Part III of the Articles). Including provisions on countermeasures in the draft articles was by no means consensual. Their necessity and appropriateness, the procedural and substantive conditions limiting their invocation, and the practicality of the regime adopted by the Commission will be among the issues very likely to arise in future practice.

Simultaneously, the new concept of responsibility in the international legal order was given more weight by attempts to shift from a traditional bilateral approach of state responsibility to "multilateralization" of the new legal relations to which breach of an international obligation could give rise. Whereas relations of state responsibility concerned only two states (the author of the breach and the aggrieved state) in the traditional, compensatory, approach, in the new concept put forward by Ago they may now involve several states (and possibly all of them). If the objective is to ensure a prompt return to legality, it is indeed only logical to enable as many states as possible to react
to the initial breach and to call for its cessation, at least when rules deemed to be of essential interest for the international community are at stake.

This collective dimension of state responsibility has been gradually implemented in the draft articles by the special rapporteurs who succeeded Ago, most recently by James Crawford, who ultimately saw the project through. Crawford’s work helped the Commission to substantially refine the circumstances in which a state may be considered as injured, even when it was not immediately affected by the breach. This collective aspect of the new regime of state responsibility has also raised significant controversies and calls for fresh examination.

The fate of the ILC's work on state responsibility to date is rather unusual. Whereas draft articles submitted to UN member states by the Commission have generally been adopted formally and have constituted the bases for full-fledged conventions, the General Assembly merely "took note of" the 2001 text. This obviously raises the question whether the Articles can be invoked in bilateral interstate relations as well as before international bodies, whether these are political or judicial. While a large proportion of the articles reflects international customary law, it is far from obvious that the same could be said of others. How states and judges will handle those more controversial concepts is an open issue.

REMARKS BY LAURENCE BOISSON DE CHAZOURNES

The topic of countermeasures¹ is a sensitive issue because it is controversial in the context of the ILC’s work on state responsibility (also referred to as the ILC articles).² As a result, the ILC regime of countermeasures is tainted with compromises. In the ILC articles, countermeasures are envisaged both as a circumstance precluding wrongful­ness and as a legal consequence of an internationally wrongful act. I deal with the latter here.

Compromises were made between a liberal and a more restrictive view of countermeasures. The liberal view was shared by those who did not want any explicit procedural requirements to be imposed upon the resort to countermeasures. The point was made that, were limitations to become too restrictive, it would be better not to have a chapter on countermeasures at all. Those favoring the more restrictive approach, seeking strong limitations, held the view that, were these limitations not to be included in the ILC articles, it would be better not to deal with the topic at all. They saw a risk of unduly legitimizing unilateral measures to the detriment of weak countries. The Special Rap­porteur put forward a compromise between these two views that was endorsed by the ILC. I will try to highlight some of its weaknesses and uncertainties. I will then raise the topic of countermeasures against the background of globalization and increasing inter­dependence.

¹ Professor and Director, Department of Public International Law and International Organization, Faculty of Law, University of Geneva.

² By countermeasures, I mean the classical measures of international law taken unilaterally by one state (in some cases not the state directly injured) in response to a breach of international law committed by another state. These measures are also known as reprisals or retaliation. These interstate measures are distinct from institutionalized countermeasures, also referred to as international sanctions, provided for in Article 41 of Chapter VII of the UN Charter. Among other differences, whereas resort to individual countermeasures is left to the discretion of each state, sanctions are decided upon by an international organ, the Security Council, and all members of the United Nations, must implement them. The relationship between these two types of measures has been partly addressed in the ILC articles on state responsibility.

Countermeasures and Dispute Settlement Procedures

Article 52 of the ILC articles detailed procedural conditions relating to the resort to countermeasures, although leaving areas of uncertainty. For instance, in the relationship between countermeasures and dispute settlement procedures, there is a compromise with the obligation to settle disputes because the ILC’s solution does not require as a first step the resort to available dispute settlement mechanisms. In other words, there is no built-in incentive to use dispute settlement. Article 52, paragraph 3 requires the suspension of countermeasures only when the states concerned are before a court or tribunal with the power to make binding decisions. It thus ignores a whole range of contemporary dispute settlement mechanisms, diplomatic or quasi-judicial, that play a crucial role in promoting compliance with international law.

The previous Special Rapporteur, G. Arangio-Ruiz, had taken the position that, except in specified circumstances, countermeasures cannot be taken until all available settlement procedures, be they diplomatic or judicial, have been exhausted, but this view was considered too restrictive of the injured state’s prerogative to take countermeasures. This might be the case in certain circumstances, but not in all. In diplomatic practice within international economic organizations and agreements (WTO and NAFTA, for example), it is generally provided that countermeasures should be a last resort. These economic agreements indicate the willingness of states to restrain as much as possible the use of these measures and to couch the resort to countermeasures within a dispute settlement framework.

Negotiations before resorting to countermeasures should have been given greater emphasis, to alleviate the risks of arbitrariness. Instead, as Special Rapporteur James Crawford said, “[T]here is no specific prohibition against the taking of countermeasures pending negotiations.” Countermeasures are not a means of negotiation. They should be exercised only to induce the responsible state to settle a dispute, if it fails in good faith to implement the dispute settlement procedures, as is provided for in the ILC articles (albeit only in relation to judicial dispute settlement procedures (Article 52, para.4)).

Another dispute settlement problem is the risk of confusion between countermeasures in general on the one hand and “urgent countermeasures as are necessary to preserve” the rights of the injured state on the other. The criteria for the latter are vague; the ILC regime is built on the premise that resort to countermeasures is a means of protecting sovereign rights. The question then is what are those rights that deserve greater protection? There is a risk that a right of self-preservation could be invoked to justify violations of international law beyond what is already allowed under the countermeasures regime. In addition this distinction might lead to confusion between countermeasures and interim measures of protection awarded by third parties, and doing so weakens the inducement for settling disputes before resorting to unilateral measures.

5 “Countermeasures may not be taken, and if already taken must be suspended without undue delay if: ... (b) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.”

6 See, e.g., Understanding on Roles & Procedures Governing the Settlement of Disputes, April 14, 1994, 33 ILM 1226, 1239 (1994). The complainant yet may seek authorization from the WTO Dispute Settlement Body (DSB) “to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.”


8 CRAWFORD, supra note 5, at 53.
Obligations not Affected by Countermeasures and Prohibited Countermeasures

The article on "obligations not affected by countermeasures" (Article 50) would have been better formulated as a provision on prohibited countermeasures. It lists specific obligations not subject to countermeasures, with an intent to remove uncertainty and to give guidance. The article distinguishes between, on the one hand, fundamental substantive obligations that may not be affected by countermeasures (prohibition of the use of force, protection of fundamental human rights, humanitarian obligations prohibiting reprisals, and jus cogens) and, on the other hand, dispute settlement and diplomatic and consular obligations. Looking at this list, the only possible reaction is that this is a mélange des genres. It would have been better to highlight that there are different categories of norms in international law, among them norms to be respected in all circumstances, whatever the reasons for violating them. Those are the ones mentioned in Article 50, paragraph 1. Exhaustion of dispute settlement commitments pertains to another range of issues, the procedural ones.

The consequences of a mélange des genres might be important as the idea of using force to settle disputes is being revamped. There is a risk of legitimizing forceful practices that are prohibited under international law. This trend goes together with the tendency today to affirm that "collateral damage" is to be expected, an argument used to justify violations of humanitarian law and human rights. This type of argument cannot hold with norms that must be respected in all circumstances.

Countermeasures, Third States, and Interdependence

With respect to the notion of the injured state, the ILC takes a bilateralist approach—not to say a contractualist one—whether in its conception of the relation between an offending state and the injured state, a group of states, or the international community as a whole. The ILC articles say noting directly about the effects of countermeasures on third states, and it is not clear if the idea is implicit in Article 27 (b), which deals with compensation for any material loss when a circumstance precluding wrongfulness is invoked, covers these effects. The commentary to Article 22 on "countermeasures in respect of an internationally wrongful act" mentions this problem, but it is not strong enough in an age of increased interdependence. Effects of countermeasures can be pervasive, touching states and people that are not "responsible" under international law. It would have been better to state explicitly that countermeasures should only be directed at the state responsible, especially as "indirect or consequential effects of countermeasures on third parties which do not involve an independent breach of any obligation to the third parties, will not take a countermeasure outside the scope of article 22."11

This bilateralist approach does not adequately reflect the fact that there are issues of common interest to all states (to be differentiated from those deriving from peremptory norms of general international law). Protection of the environment illustrates the point well. Diverting a watercourse as a countermeasure might not only damage another riparian state that allegedly is responsible for a wrongful act, it may also damage other states in a region, not to mention the international community as a whole. Restrictions on trade exchanges with one country might lead to deforestation, to the detriment not only of the state responsible but also possibly other states. These types of consequences of countermeasures are not well appreciated in the ILC articles.

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9 Relevant here is the commentary to Article 40, which states "[i]n the light of the International Court's description of the basic rules of international humanitarian law applicable in armed conflicts as 'intransgressible' in character, it would also seem justified to treat these as peremptory." UN Doc. A/56/10 (2001) at 284, para. 5.

10 Article 17 reads: "The invocation of a circumstances precluding wrongfulness in accordance with this Chapter is without prejudice to... (b) the question of compensation for any material loss caused by the act in question." UN Doc. A/56/10 (2001) at 209.

11 Id. at 181.
Furthermore, protection of the environment must take into account the precautionary approach and uncertainty about potential long-term effects. Do the notions of "peremptory norms of general international law" or "proportionality" reflect these concerns? I am not sure. The ICJ decision in the case of the Gabcíkovo-Nagymaros Project does not help much on this point; it dealt with the issue mainly from an economic angle in assessing proportionality. Environmental considerations were marginal in the Court's reasoning with respect to countermeasures.

**Nonstate Actors and Countermeasures**

Lastly, it is interesting that the notion of the "international community as a whole" is mentioned several times in the ILC articles. According to the Special Rapporteur, there is only one international community, to which all states belong but which is no longer limited to states. While it is true that states retain a preeminent role in making, implementing, and enforcing international law, they no longer have a monopoly of interest and action. The international community now also includes entities such as the UN and other international organizations. In addition, NGOs, private companies or individuals increasingly have a voice in international relations.

Including nonstate actors within the scheme of the ILC articles is interesting and could have been explored. Coercion, enforcement, and punishment have been the key words for justifying resort to countermeasures. However, these measures have not been very effective for restoring the status quo or respect for the rule of law. There is a need to identify new means of ensuring compliance with law; the involvement of individuals, corporate actors, and expert communities is a means towards this end—part of the socialization of international law and of the inclusiveness of the international system. Signs of these trends can be found in environmental, social, and human rights forums, with the involvement of nonstate actors through boycott campaigns, public denunciation, or litigation. These actions can be more effective than typical state-enforcement measures. The contribution of nonstate actors to the restoration of the rule of law through countermeasures is worth evaluating.

**REMARKS BY XUE HANQIN**

I shall confine my comments to the collective concept adopted by the Commission in the regime on state responsibility, as expressed particularly in Articles 42, 48, and 54. In Article 42 on the definition of an injured state, the Commission on second reading replaced the idea of multilateral obligations derived either from multilateral treaties or customary international law with a more general term, that of obligations owed to a

12 Id. at art. 50, para. 1.
13 Id. at article 51.
14 Gabcíkovo-Nagymaros Project (Hung./Slovak.), 1977 ICJ REP. 7, 80 at para. 147 (Sept. 25).
15 Id. at 56, para. 85.

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube—with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz—failed to respect the proportionality which is required by international law.

16 CRAWFORD, supra note 5, at 40–41.

*Director-General, Department of Treaty and Law, Ministry of Foreign Affairs of the People's Republic of China; Member of the International Law Commission. Views expressed therein are only of the author and do not in any way represent the institution she works for.*