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'"The ILC Articles on State Responsibility are the Napoleonic Code of international law." Discuss.

Introduction

Whilst exiled on the island of St Helena, Napoleon wrote, "My true glory is not in having won forty battles; Waterloo will blot out the memory of those victories. But nothing can block out my Civil Code. That will live eternally."[1] He was surely right. In 1804, Napoleon codified a fragmented legal landscape to ensure the civil rights and obligations of French citizens could be enforced uniformly. Napoleon's Civil Code did not simply transform the legal order of Revolutionary France; it progressively developed the domestic codes of innumerable countries with its rational clarity and concision, making Romanised jurisprudence global.[2]

Napoleon's determination to extend the frontiers of his *mission civilastrice* reflected an aspiration to build an international community. That ambition endures, not least, in the politics of international law today. Twenty years ago, following decades of deliberation, the ILC resolved to codify and progressively develop the "basic rules" of international law when it published the Articles on State Responsibility (ILC Articles). In Napoleonic fashion, perhaps, the goal was to systematise the customary international law of state responsibility to safeguard the interests of the "international community as a whole". Whilst the ILC has traditionally maintained a position of strategic ambiguity as to the legal status of the rules it articulates, it is clear "that the aspiration was to produce a set of provisions that could be plausibly invoked as *lex lata*."[3]

Parallel ambitions to provide a legal code, however, are not sufficient for claims of equivalence between two documents whose practical implications significantly diverge. Whilst the ILC Articles have positively contributed to the development of an effective international legal order, the need for consensus and pragmatism in state management currently preclude the enforcement of a truly universal, hard code with specific obligations. Instead of a Napoleonic Code, the ILC Articles have become the primary vocabulary for applying and assessing state responsibility in international law. It is in the realm of normative regulation, therefore, that the ILC Articles wield their maximal authority. The fragmentation of sovereignty and the privatisation of power, however, present an urgent case for reforming the ILC Articles, so that they can better address the problems facing the

[1] Charles-Tristan De Montholon, *Récits de la captivité de l'empereur Napoléon a Sainte-Hélène* (Paulin, Paris 1847), p. 401

[2] Charles Sumner Lobingier, Napoleon and His Code, *Harvard Law Review*, Dec., 1918, Vol. 32, No. 2 (Dec., 1918), pp. 114-134

[3] Fernando Lusa Bordin, Still Going Strong: Twenty Years of the Articles on State Responsibility's 'Paradoxical' Relationship between Form and Authority, (*EJIL: Talk!*): https://www.ejiltalk.org/still-going-strong-twenty-years-of-the-articles-on-state-responsibilitys-paradoxical-relationship-between-form-and-authority/ [Accessed on 28th August 2021]

world today.

What is state responsibility and how is it distinguished from normative forms of legal obligation?

Before embarking on a wider inquiry, it is first necessary to define some terms. As described in the general commentary, the ILC Articles spell out "the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow there-from".[4] The Italian scholar, Robert Ago, who was responsible for establishing the basic structure and orientation of the ILC project, purposefully limited the endeavour to codifying the secondary rules of state responsibility.[5] As such, the ILC Articles do not attempt to define the content of specific international obligations, since that function is the purpose of primary rules.

The reasons for this are both practical and political. First, it is very difficult to determine at a particular moment in time what all the obligations of a given state are. Indeed, reflecting on this predicament, the late James Crawford opined that "a Napoleonic Code is completely beyond our capacity".[6] Second, as Ago recognised, general propositions about state responsibility are more enduring because they are less likely to be politically contested by disagreeable states. The clearest way to conceptualise the ILC Articles, therefore, is a "framework in which the obligations of states operate".[7]

The concept of state responsibility is also distinct from the notion of liability we find in national legal systems such as the Code Napoléon. Whereas domestic systems tend to distinguish between different forms of liability according to the source of obligation breached, responsibility has a more general scope. Foreshadowing what is now ILC Article 12, the arbitral tribunal in the *Rainbow Warrior* case said, "the general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligations…".[8] This was a critical precedent demonstrating that the principles of state responsibility may govern the terms of any inter-state dispute, albeit in conjunction with the relevant specific law.

Focussing on comparisons, however, detracts from the theoretical space the ILC Articles seek to occupy. Ago and his predecessor, Dionisio Anzilotti, advanced the notion that responsibility was necessary as a discrete category to guarantee the observance of rules in the international legal system.[9] In this vein, the mere breach of an international

[4] *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (United Nations, 2001)
[5] *Ibid.*
[6] Christian J. Tams and James Sloan, *The Development of International Law by the International Court of Justice* (Oxford, 2013) p.75.
[7] *Ibid*.
[8] *Rainbow Warrior Case*, (New Zealand v. France) (1990) 82 I.L.R. 500.
[9] Katja Creutz, *State Responsibility in the International Legal Order* (Cambridge, 2020)

obligation generated responsibility, without the need for fault or injury. Responsibility, therefore, is the anterior condition for developing a "community of states" committed to a system of laws. In a community based on mutually acknowledged obligations, moreover, the unilateral exercise of sovereignty becomes fettered.

As Crawford argued in the months before the ILC Articles were adopted, the ILC's concept of responsibility rests on the premise that "some obligations are universal in scope, and cannot be reduced to bundles of bilateral interstate relations [but are] owed to the "international community as a whole."[10] This universalist sentiment lends weight to Nollkaemper's submission that the ILC's approach to responsibility attaches constitutional value to safeguarding legality at the international level, in addition to serving a reparative function.[11] In summary, state responsibility may be distinguished from Napoleonic legal obligations both in terms of theoretical origin and practical application.

The Application of the ILC Articles

The feature which most clearly distinguishes the ILC Articles from the template of a Napoleonic Code is their institutional form, or lack thereof. David Caron was most astute in recognising the "paradox" presented by the fact that despite not being a formal treaty, the "draft [articles] had the look and feel of a treaty" which gives the "illusion of legal authority".[12] Indeed, ever since their publication in 2001, the issue of formally adopting the ILC Articles has been on the agenda of the Sixth Committee of the UN General Assembly, but without any progress towards the negotiation of a convention.

Contrary to the qualms of conventionalist scholars who favour a formal treaty akin to the Vienna Convention, the ILC's consensus-building approach has its merits in that "progressive development" contributes to the overall strength of the project. An example of the success of this gradualist approach is the correspondence between the ILC Articles and the jurisprudence of the International Court of Justice (ICJ). The *Gabčíkovo-Nagymaros Project* case famously featured a discussion of the defence of necessity and the role of state countermeasures. Despite the Court's rejection of Hungary's position on the facts of the case, both principles were both subsequently taken up by the ILC in Articles 25 and 22 respectively.[13]

This is the original example of what Crawford terms the "symbiotic relationship" between the ILC and the ICJ, but there are various others.[14] For instance, in the *Bosnian*

[10] James R. Crawford, Responsibility to the International Community as a Whole, *Indiana Journal of Global Legal Studies*, Vol. 8, No. 2 (Spring, 2001), pp. 303-322
[11] André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2012–2013) 34 *Michigan Journal of International Law* pp. 359–438
[12] David Caron, The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority, *American Journal of International Law*, Volume 96, Issue 4, October 2002, pp. 857 - 873
[13] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ
[14] Christian J. Tams and James Sloan, *The Development of International Law by the International Court of Justice* (Oxford, 2013) p.73.

Genocide case, the ICJ endorsed seven of the ILC Articles, including Article 16 dealing with complicity. The Court additionally clarified the law on state attribution under Article 8 by ruling in favour of an "effective control" test.[15] This settled the dispute created by the rival tests articulated in *Nicaragua*[16] and *Tadic*.[17] The cumulative effect of this "mutual endorsement" is that "there is now a presumption that the ILC Articles reflect international law, unless it can be shown that they do not – a status which took the Vienna Convention…thirty years to reach."[18]

Communitarian Norms

Fulfilling Ago's aspirations, the ILC Articles have also progressively developed the protection of communitarian norms in international law. This has principally come through the operation of Article 48, which identifies the right of third states to invoke responsibility when it comes to obligations owed to the international community as a whole. The ILC's rendition of collective responsibility has made its greatest impression in the field of human rights protection. For instance, the ICJ's *Wall* Advisory Opinion held that all states are under an obligation not to recognise the illegal situation resulting from Israel's construction of the wall on Palestinian territory.[19] Technically, the ruling was expressed in terms of positive obligations to take countermeasures under Article 54 and to desist from recognition under Article 41, but the ICJ reached these conclusions having first decided that Israel had violated humanitarian law obligations *erga omnes* - effectively endorsing the logic of Article 48.[20]

More recent jurisprudence under Article 48 further exhibits how the ILC Articles have gone beyond "reflecting" international law to shaping it in a more active way. For example, the ICJ's ruling in *Obligation to Prosecute or Extradite (Belgium v. Senegal)* was the first judgement to find that a state had standing based on obligations *erga omnes partes* under Article 48.[21] Specifically, the Court held that Belgium as a non-injured state had standing because of the common interest of states in compliance with obligations arising out of the Convention Against Torture 1984. This ruling had two main consequences. First, it gives significant weight to the procedural effect of obligations arising *erga omnes*. Second, it buttresses the ILC's over-arching project to codify the invocation of state responsibility by third parties.

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[15] *Bosnia and Herzegovina v Serbia and Montenegro* [2007] ICJ 2 (n 11) 208–9 para [401]
[16] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits [1986] ICJ Rep 14
[17] International Criminal Tribunal for the Former Yugoslavia (ICTY) Case No IT-94-1 *Prosecutor v Tadic´* (1999) 38 ILM 1518
[18] Christian J. Tams and James Sloan, *The Development of International Law by the International Court of Justice* (Oxford, 2013) p.86.
[19] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136
[20] Edited by Ulrich Fastenrath et al, *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford, 2011) pp. 233-234.
[21] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 at para [68]

Indeed, the precedent in *Belgium v Senegal* has been positively re-affirmed by the ICJ's decision in *The Gambia v. Myanmar*. In the latter case, the decision of the ICJ to implement provisional measures to protect the Rohingya from genocide strongly suggests that a community protection norm has successfully emerged in international law.[22] Whilst the Court did not explicitly mention Article 48, "its reasoning drew no distinction between the entitlement of a non-injured state to invoke another state's responsibility and the standing of the non-injured state to seek recourse at the ICJ if a jurisdictional basis exists."[23] The case stands as a landmark example of joint law-making by the ICJ and the ILC. Indeed, it stands as perhaps the greatest exhibition to date of the "symbiosis" Crawford described.

It is clear from the jurisprudence of the ICJ that the ILC Articles on state responsibility have played a significant role in clarifying and harmonising the application of international law. Their normative influence has also been considerable, particularly when it comes to building a multilateral system for the protection of human rights.

The Implications of Lex Specialis

Looking upon the frequency of judicial citations in isolation, however, would give a false impression of the ILC Articles and the legal role they play. As espoused in Article 55, the ILC Articles do not apply where the dispute in question is governed by special rules of international law. Thus, the rules make explicit use of the legal principle *lex specialis derogat legi generali*. Bordin eruditely captures the significance of this principle: "unlike in domestic systems, where codifications acquire content-independent authority when enacted by a legislature, the authority of international law codifications is typically content-dependent."[24]

The clearest illustration of this content-dependency is investment treaty arbitration. Indeed, this field of law is perhaps where the ILC Articles are most institutionalised. Unlike bilateral state disputes, these claims involve a foreign investor and a state, and thus potential responsibility vis-à-vis private parties rather than another state. The rulings of investment tribunals reflect this hybrid settlement. For example, in *Wintershall v. Argentina*, the tribunal held that the ILC Articles did not extend to non-state actors.[25] Furthermore, in *UPS Inc. v.* Canada, the tribunal held that various articles within the NAFTA treaty, when read against Article 55, did in fact exclude the applicability of the attribution rules in ILC Articles 4 and 5 to entities such as Canada Post.[26]

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[22] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* ICJ 2019

[23] Michael A Becker, The Plight of the Rohingya: Genocide Allegations and Provisional Measures in The Gambia v Myanmar at the International Court of Justice, *Melbourne Journal of International Law*, Vol. 21, No. 2, 2020

[24] Fernando Lusa Bordin, Still Going Strong: Twenty Years of the Articles on State Responsibility's 'Paradoxical' Relationship between Form and Authority, (*EJIL: Talk!*): https://www.ejiltalk.org/still-going-strong-twenty-years-of-the-articles-on-state-responsibilitys-paradoxical-relationship-between-form-and-authority/ [Accessed on 28th August 2021]

[25] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14

[26] *United Parcel Service of America Inc. v. Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, (May 24, 2007)

More recently, in *Adel A Hamadi Al Tamimi v Oman*, the tribunal held that responsibility for the actions of a state-owned company could not be attributed to Oman because the treaty provisions on attribution declared the state-controlled enterprise must act in the exercise of "regulatory, administrative or governmental authority".[27] The tribunal's reasoning was salient because it contained both "positive" and "negative" rules on attribution, in clear illustration of how the ILC Articles actively shape the norms of economic regulation.[28]

On the one hand, the treaty provision was broader than the attribution rule in Article 5 as it was not limited to government authority. On the other, it was narrower than other attribution rules in the ILC Articles since it excluded attribution based solely on state control over the enterprise, for instance under Article 8.[29] Given the intricacies of the tribunal's reasoning, Olleson is on strong footing to argue that it is in the sub-field of attribution that the ILC Articles have been most successfully integrated into the decision-making of arbitration tribunals.[30]

The application of *lex specialis*, however, should be evaluated against a consistent body of case-law, exemplified by the ruling in *Noble Ventures v Romania*, in which the tribunal affirmed that whilst the ILC Articles are "not binding, they are widely regarded as a codification of customary international law."[31] Thus two things can simultaneously be true. First, that the ILC Articles possess general authority in international law and second that parties may "contractually" exclude themselves from this authority in certain circumstances.

Quite unsurprisingly, this duality has given rise to significant debate regarding the scope of authority wielded by the ILC Articles. Crawford was perhaps too pessimistic when he contended that many of the references to the ILC Articles are by way of "signposting" with limited substantive application.[32] Olleson is more persuasive in describing this duplexity as the reflection of a "differentiated" regime in which the rules on attribution are applied distinctively. For him, what matters is that the relationship between the conduct of the state and the relevant non-state entity is compatible with customary principles. For example, whilst investment tribunals may question the suitability of the ICJ's Article 8 attribution criteria in *Bosnian Genocide*, they still apply them.[33] In sum, flexibility need not imply legal inconsistency.

[27] *Al Tamimi v. Oman*, ICSID Case No. ARB/11/33, Award, (Nov. 3, 2015)
[28] Marko Milanovic, Special Rules of Attribution of Conduct in International Law, 96 *INT'L L. STUD*. 295 (2020)
[29] *Ibid*
[30] Simon Olleson, Attribution in Investment Treaty Arbitration, ICSID Review - *Foreign Investment Law Journal*, Volume 31, Issue 2, Spring 2016, pp. 457–483
[31] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11
[32] James Crawford, Investment Arbitration and the ILC Articles on State Responsibility, *ICSID Review - Foreign Investment Law Journal*, Volume 25, Issue 1, Spring 2010, pp. 127–199
[33] Simon Olleson, Attribution in Investment Treaty Arbitration, ICSID Review - *Foreign Investment Law Journal*, Volume 31, Issue 2, Spring 2016, pp. 457–483

Reflecting on this position, it would appear that whereas an international Napoleonic Code might require rigid uniformity, the ILC Articles allow for variety. To borrow Creutz's framing, the diversity of the responsibility regime suggests the ILC Articles constitute a "residual" source of international law norms which allow states "to create and apply complementary – or even wholly different – rules of state responsibility".[34]

The risks of state fragmentation and the privatisation of power

When assessing the impact of the ILC Articles, it is essential to keep in mind the political context in which they emerged and the landscape in which they now operate. The "state" Ago conceptualised when drafting the ILC Articles has been radically transformed by the twin forces of globalisation and privatisation. Various governance functions, which used to be undertaken by sovereign states, are now performed by non-state entities. From NGOs and trans-national corporations to automated computer algorithms, the list is numerous and is set to grow further still.

The changing nature of global governance also threatens to accentuate a political dilemma at the heart of the ILC Articles between needing to defer to states in terms of how they internally organise themselves, whilst also ensuring that privatisation does not facilitate the evasion of responsibility. Indeed, it would not be an exaggeration to contend that "the more significant the international role of private actors, the less any regime of public law responsibility is able to regulate the effects of globalization".[35]

Whilst this conundrum affects many policy fields, the global environmental crisis is a pertinent case study to illustrate its significance because climate policy sits directly at the intersection of public and private responsibility. With respect to the ILC Articles, there are two conjoined problems. First, there is the issue of attribution. Who can be held responsible when environmental damage is cumulatively caused by multiple, overlapping parties? None of the exacting standards on attribution under Chapter II of the ILC Articles would be able to capture private entities operating independently. Second, as shown by the outcome of the 2016 *South China Sea Arbitration*, a state can still be deemed diligent in its regulatory practices, even if the actions of private actors caused significant harm.[36]

Various scholars have additionally pointed to the institutional limitations of the ILC Articles when it comes to the assessment of shared responsibility. For instance, as Le Moli observes, would Article 15(1), which concerns breaches consisting of composite acts, "be able to regulate composite acts made [up] of [the] acts/omissions of several States which do

[34] Katja Creutz, The Tenacity of the Articles on State Responsibility as a General and Residual Framework: An Appraisal (*EJIL: Talk!*) https://www.ejiltalk.org/the-tenacity-of-the-articles-on-state-responsibility-as-a-general-and-residual-framework-an-appraisal/ [Accessed on 28th August 2021]

[35] Martti Koskenniemi, 'Doctrines of State Responsibility', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford, 2010), pp. 45–51 at 51

[36] *South China Sea Arbitration (Philippines v China)* [2016] PCA Case No. 2013-19

not constitute, for any or for some of those States, a composite breach of an obligation?"[37] An ambitious approach might be to advance responsibility claims against the failure of states to meet their environmental obligations, based on *erga omnes partes*. Yet such claims rest on there being a primary treaty framework in place, regulating a particular form of environmental harm.

That is not to say the entire edifice of state responsibility is unfit for purpose in the face of these challenges. For instance, in *Costa Rica v. Nicaragua*, the ICJ was progressive in holding that damage to the environment was compensable, demonstrating that the customary rules on reparation were sufficiently flexible to encompass Costa Rica's creative submissions on "eco-systemic services".[38]

Nevertheless, the sum of these rhetorical questions leads to an inexorable conclusion – that the ILC Articles lack the specificity and regulatory scope required for resolving the problems caused by the fragmentation and privatisation of state power. What is seemingly required is the emergence of particularised responsibility regimes to complement the existing rules. Ironically, that would require a move towards a genuine international Napoleonic Code.

Conclusion

The ILC Articles on State Responsibility are not the Napoleonic Code of international law. Such a proposition simplifies a conceptually and practically unique form of legal regulation. Nevertheless, the fact remains that the ILC Articles have "codified" customary principles of international law, albeit "softly".[39] The coherent and rigorous application of the ILC Articles is testament to their success in systematising the way international lawyers apply the rules in this field. The fact remains, however, that the ILC Articles face a significant challenge in the future. If they are to continue solving the problems of our time, perhaps it is necessary for them to take a Napoleonic turn.

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[37] Ginevra Le Moli, State Responsibility and the Global Environmental Crisis, (*EJIL: Talk!*): https://www.ejiltalk.org/state-responsibility-and-the-global-environmental-crisis/ [Accessed on 1st September 2021]

[38] *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018

[39] Fernando Lusa Bordin, Reflections of Customary International Law: the authority of codifications and ILC Draft Articles in International Law, *International & Comparative Law Quarterly*, Vol 63, Issue 3 July 2014, pp. 535 – 567

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