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# *Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility*

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## **Abstract**

*The question of the place of fault in the system of state responsibility has long been avoided by the International Law Commission. The Commission chose not to dwell on what was felt to be an old academic dispute and preferred to deal with the fault issue in a pragmatic way by envisaging it as a circumstance, the absence of which must be proven by the respondent state in order to preclude the wrongfulness of its conduct. In the Draft approved on its first reading, some hidden and open references to fault were found in various chapters, from imputation to the ascertainment of the consequences of the wrongful act, but the issue was not sufficiently explored. The present author urges the ILC to bring more clarity to this fundamental topic.*

Some years ago, Jagota, a former member of the ILC, referring to the place of fault in the Draft Code on State Responsibility, wittily remarked: 'It is like when you enter a room, and you can tell that somebody has just smoked a cigarette. You can't see the smoker, but you know he's there.' This image was very well chosen, and not least because nowadays the proponents of the fault theory in international law are being chastised by the majority for defending the indefensible. For some decades, the exclusion of any psychological element in the structure of the international wrongful act has been greeted as an achievement of international law, contributing to clarity and stability in international relations,<sup>1</sup> or at any rate as proof of international law's ability to keep pace with the most innovative trends in domestic legal thinking. One may wonder, however, whether the opposite is not the case: an emphasis on the centrality of the individual, with all its consequences, would appear to be a more

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<sup>1</sup> For an echo of this mood see the ILC Report on the Work of Its Fiftieth Session, 1998, UN Doc. A/53/10, para. 283.

remarkable achievement for an order that is too often biased towards being primitive.<sup>2</sup> Be that as it may with regard to the preferred view on the advancement of international law, my purpose in this short contribution is to demonstrate that not only is there still smoke lingering in the ILC meeting-room, but that the ILC, especially under the influence of its previous Special Rapporteurs Ago and Arangio-Ruiz, risks contracting a bad case of smoker's cough.<sup>3</sup> More difficult to answer is the ultimate question: Was that the very last ILC cigarette?

2. Special Rapporteur Ago let ashes fall on many places, some of them discreetly concealed in various folds of the Draft Articles, others (apparently) inadvertently spread over the surface. A most intriguing question is whether traces of fault are even present in the centrepiece of the Draft Articles, namely Article 3, which defines the 'elements of an internationally wrongful act of a State'. The faultist militants have no doubts. It was Ago who demonstrated long ago that the question of attribution of a conduct to the state under international law is a juridical operation belonging to international law alone,<sup>4</sup> and this point is duly confirmed in Draft Article 4. It was again Ago who showed, through his study of international jurisprudence and practice, that international law also attributes directly to the state the psychological attitude of the individual agent: it therefore follows that it is not necessary to spell out the issue of fault, because it is already implied in the question of attribution.<sup>5</sup>

As is well known, some distinguished German authors have stressed the practical relevance of fault, especially in relation to omissions; and their assessment would make it necessary to conduct an inquiry into the psychological intent of the author, while in cases of action the use of the standard of due diligence would deprive the issue of fault of much of its relevance. Ago managed to accommodate this doctrine as well. In his proposed Article 11 para. 2 the question of conduct of persons not acting on behalf of the state would have been 'without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish . . . and failed to do so'.<sup>6</sup> Consequently, he had proposed a Draft Article 23 ('Breach of an International Obligation to Prevent a Given Event'), according to which there would have been no breach 'unless following a lack of prevention on the part of the State'.<sup>7</sup>

<sup>2</sup> On this debate see Zemanek, 'Responsibility of States: General Principles', *Encyclopedia of Public International Law*, Inst. 10 (1987), 362; *Idem*, 'The Legal Foundation of the International System', 266 *RdC* (1997) 9.

<sup>3</sup> I have already extensively dealt with this subject elsewhere, see 'La notion de faute à la lumière du projet de convention de la Commission du Droit International sur la responsabilité internationale', 3 *EJIL* (1992) 253.

<sup>4</sup> See R. Ago, 'Le délit international', 68 *RdC* (1939) 415, at 469, for an ultimate confutation of Anzilotti's 'negationist' doctrine; this latter had presumed to demonstrate the impossibility of giving place to fault in international law on the basis of pure logic and theory. See also R. Ago, Third Report on State Responsibility, *Yearbook of the ILC* (1971, II, Part 1), paras 60 *et seq.*

<sup>5</sup> In this sense see Spinedi, 'Responsabilità internazionale', 27 *Enciclopedia giuridica dell'Istituto dell'enciclopedia italiana* (1991).

<sup>6</sup> See R. Ago, Fourth Report on State Responsibility, *Yearbook of the ILC* (1975, II, Part 1), at para. 146.

<sup>7</sup> See R. Ago, Seventh Report on State Responsibility, *Yearbook of the ILC* (1978, II, Part 1), at para. 19.

However, in the Draft approved on first reading by the Commission, the text of Article 11 para. 2 was changed, and the reference to lack of prevention in Article 23 was eliminated. Not surprisingly, German-speaking commentators, and most eminently Zemanek,<sup>8</sup> complained that Article 23, as it now stands, could be perceived as formulating a strict liability standard for omissions in spite of contrary state practice (and doctrine). That was clearly not the intention of the Commission. In its commentary to the Article, it noted that the final wording, 'by the conduct adopted', was chosen to express the requirement 'that the occurrence of the event must have been made possible by the conduct that the State *chose* to adopt in the case in question, whereas by a different conduct it would have been able to achieve the required result'.<sup>9</sup> As regards the formulation of Article 11 para. 2, other German authors criticized the deletion of any mention of omissions by state agents and the mere reference of attribution 'by virtue of articles 5 to 10', arguing that this deprived the rule of any practical meaning, with the exception of the relatively rare case of a parallel positive action by the state concurring with the action of individuals, or subsequently adopting it as its own.<sup>10</sup> Indeed Article 11 para. 2 was the result of a compromise between two opposing views in the ILC: between those members who wanted to codify a sort of guarantee by the state against the consequences of acts of private persons, and other members who wanted to stress the notion of due diligence as a parameter for the appraisal of state conduct. As the commentary makes clear, the Commission wished to avoid touching on, even indirectly, the determination of the content of the 'primary' obligations of states.<sup>11</sup> It is nevertheless true that the article, as it was eventually drafted, did not have any significant content, not even that of shifting the burden of proof, and the present Commission did well to follow the current Special Rapporteur's proposal to delete it altogether and to deal in a specific article with the question of responsibility of the state for acknowledging or adopting the injurious conduct of individuals as its own.<sup>12</sup>

3. Despite the immense amount of debate and literature devoted in the last decades to Draft Article 19 on the concept of international crimes, little attention has been paid to the fault aspect of the issue. However, it creates the subtext of the entire article. Even if there is no doubt that the international responsibility of states is neither civil nor

<sup>8</sup> See Zemanek, 'Schuld und Erfolgshaftung im Entwurf der Völkerrechtskommission über Staatenverantwortlichkeit', *Festschrift Binschedler* (1980) 315, at 322.

<sup>9</sup> *Yearbook of the ILC* (1978, II, Part 2), at para. 16 (emphasis added).

<sup>10</sup> See Mössner, 'Privatpersonen als Verursacher völkerrechtlicher Delikte', 24 *German Yearbook Int'l Law* (1981) 63; Wolf, 'Zurechnungsfragen bei Handlungen von Privatpersonen', 45 *Zeit. ausl. öff. Recht und Völkerrecht* (1985) 232, at 250 *et seq.* *Idem*, *Die Haftung der Staaten für Privatpersonen nach Völkerrecht* (1997), at 152.

<sup>11</sup> *Yearbook of the ILC* (1975, II, Part 2), at para. 37.

<sup>12</sup> See ILC Report, *supra* note 1, at paras 419 and 425, and J. Crawford, First Report on State Responsibility, UN Doc. A/CN.4/490, Add. 5, para. 247 and paras 281 *et seq.* [hereinafter 'First Report'].

criminal, but ‘purely and simply’ international,<sup>13</sup> and that the concept of international crimes of state must not be connoted with any penal implication, it is true that the subjective element gives rise to two important insights.

In 1976, as Draft Article 19 was adopted on first reading, the Commission made an explicit warning against any confusion between the expression ‘international crime’ as used in the article and certain cognate expressions, such as war crime, crime against peace or crime against humanity ‘which are used to designate certain heinous individual crimes’.<sup>14</sup> As Special Rapporteur Crawford sharply observes, it is not at all clear why a term was adopted which had to be uneasily distinguished from the ordinary meaning in which that same term is currently used in international law.<sup>15</sup> If the option of envisaging a full-scale regime for state ‘criminalization’ is not yet conceivable under present international law, as would indeed seem incontestable,<sup>16</sup> there is no alternative for international law than to criminalize the conduct of individuals, as the lessons of the Nürnberg Tribunal and the newly created permanent International Criminal Court teach.<sup>17</sup> Yet that option clearly cannot be taken up without an inquiry into the mental disposition of the author of the conduct, if only to come to the conclusion that the *mens rea* was already revealed in *re ipsa*.<sup>18</sup>

Even if the Commission were to substitute the notion of ‘exceptionally serious wrongful act’ or some such similar expression to that of crimes, it could not avoid the problem of the ‘moral element’, lest the new formula be used only to express a quantitative magnitude of international wrongful acts, a criterion which would nonetheless be both imprecise and insufficient.<sup>19</sup> This argument leads to the second insight. Should the Commission decide to retain some form of classification of international wrongful acts by the degree of their gravity,<sup>20</sup> the ascertainment of the

<sup>13</sup> See Crawford, First Report, Addendum 1, para. 60.

<sup>14</sup> *Yearbook of the ILC* (1976, II, Part 2), at para. 59.

<sup>15</sup> Crawford, First Report, Addendum 2, at para. 74.

<sup>16</sup> See *ibid.*, Addendum 3, at paras 89 *et seq.*

<sup>17</sup> Some ILC members criticized the lack of connection between the regime of state crimes in the Draft Articles on State Responsibility and the regime provided for in the Draft Code of Crimes against the Peace and Security of Mankind, which was adopted by the ILC at its forty-eighth session in 1996, see UN Doc. A/51/10, at paras 30 *et seq.* Art. 4 states that the Code is ‘without prejudice to any question of the responsibility of States under international law’.

<sup>18</sup> See Art. 30 (‘Mental Element’) and Art. 31 (‘Grounds for Excluding Criminal Responsibility’) of the Statute of the International Criminal Court, adopted on 17 July 1998 by the UN Diplomatic Conference on the Establishment of an International Criminal Court, UN Doc. A/Conf./183/10. Art. 30 of the Statute reads: ‘Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.’

<sup>19</sup> See Palmisano, ‘Les causes d’aggravation de la responsabilité des Etats et la distinction entre “crimes” et “delits” internationaux’, 98 *Revue générale dr. int. pub.* (1994) 629, who aptly distinguishes between ‘gravité substantielle’ and ‘gravité circonstancielle’.

<sup>20</sup> This does not seem to be the Commission’s present orientation, judging from the interim conclusions on Draft Article 19 drawn at the end of the Fiftieth Session. These give priority to the ‘systematic development’ in the Draft Articles of the notions of obligations *erga omnes* and *jus cogens*, nevertheless alongside ‘the possible category of the most serious breaches of international obligations’, see ILC Report on Its Fiftieth Session, *supra* note 1, at para. 331.

subjective element will necessarily constitute a determinant aggravating or mitigating factor. This point had already been hinted at by Arangio-Ruiz<sup>21</sup> and it is again acknowledged by the present Special Rapporteur. He observes that the category of international crimes, if it exists, should 'include at least some common rules relating to the requirement of fault in the commission of a crime', which, in his opinion, are missing in the Draft Articles.<sup>22</sup> While the first part of this statement may readily be agreed with, this is not the case for the second part because it fails to seize, in all its implications, the web which Ago and the Commission of the time had woven around the question of fault as a 'negative' element of the international wrongful act.

4. The central role which Ago assigned to fault is concealed in Draft Article 31, which deals with force majeure and fortuitous event.<sup>23</sup> Force majeure is described as an 'irresistible force', which makes it materially impossible for a state to act in conformity with a specific obligation. A fortuitous event is defined as 'an unforeseen external event beyond control', which again makes it impossible for a state to know that its conduct is not in conformity with a specific obligation.

The article comes under Chapter V, which lists the circumstances precluding wrongfulness. As has been noted by many commentators, and notably by former Special Rapporteur Arangio-Ruiz,<sup>24</sup> Article 31 does not fit well into this section of the Draft Articles. While the other defences are, technically speaking, causes of justification (*Rechtfertigungsgründe*), as their presence makes a specific conduct not wrongful, force majeure and fortuitous event are excuses (*Entschuldigungsgründe*), as their presence makes the conduct not punishable.<sup>25</sup> This had clearly remained Ago's position from his early publications in the 1930s down to his Eighth Report to the ILC

<sup>21</sup> G. Arangio-Ruiz, Second Report on State Responsibility, Addendum, *Yearbook of the ILC* (1989, II, Part 1), at para. 166, and *Idem*, Eighth Report, Addendum, UN Doc. A/CN.4/476/Add (1996), at para. 53. See also the discussion which took place in the ILC in 1995, referred to in the *Yearbook of the ILC* (1995, II, Part 2), at paras 264–266. According to some members (especially Pellet, 2392nd meeting, para. 62) 'the concept of fault was perfectly relevant in the case of crimes and was one of the elements that distinguished a crime from a mere delict for it entailed an element of intent and deliberation'. Interestingly, other members (Mahiou, 2393rd meeting, para. 15; Al-Khasawneh, 2394th meeting para. 27; Villagrán Kramer, *ibid*, para. 35) disagreed with this view, arguing that 'wrongful intent was also present in a delict, albeit perhaps to a lesser extent'.

<sup>22</sup> Crawford, First Report, Addendum 3, at para. 83.

<sup>23</sup> Of course, a different question is whether the ILC's systematic overall concept of fault as a negative condition of the wrongful act, which is contained in Draft Article 31, would be adequate in cases of international crimes or 'most serious breaches of international obligations'. It might well be that the absence of fault should be taken into account in those cases only as a mitigating factor. For an appropriate critique of the shortcomings of draft Chapter V in relation to international crimes see Crawford, First Report, Addendum 3, at para. 83.

<sup>24</sup> See Arangio-Ruiz, Second Report, *supra* note 21, at para. 165.

<sup>25</sup> It could be argued that Draft Article 32 on 'Distress' should also be better considered as an excuse rather than as a ground for justification. Art. 31 lett.(d) of the Statute of the International Criminal Court envisages duress as a ground for excluding criminal responsibility if the threat of imminent death or of serious bodily harm against which the person acts is 'constituted by ... circumstances beyond that person's control'.

in 1979.<sup>26</sup> But even if the Commission tried to inject more ‘objectivity’ into Ago’s proposed text,<sup>27</sup> its commentary seems generally to agree with the Special Rapporteur, since it repeatedly draws a connection between the concept of force majeure and fortuitous event and the absence of ‘guilty negligence’.<sup>28</sup>

As is well known, some doctrinal disagreement exists regarding the exact meaning of force majeure and fortuitous event as defences. Some authors consider that the two circumstances directly break the causal link, while others view them as facts excluding attribution instead of fault. This view is readily conceivable as regards force majeure, for it affects the formation of free volition, but this is not the case for fortuitous event.

As debatable as it may be from a theoretical standpoint, the reason behind Ago’s decision to insert the fortuitous event under the circumstances precluding wrongfulness was a pre-eminently practical one; namely, to provide a firm place for fault in the system of secondary rules, without having to deal with its drawbacks. The approach of masking fault as a ‘negative’ condition, i.e. as an element whose absence must be proved by the respondent state by way of excuse, offers the decisive advantage of shifting the burden of proof; through this device a solution is found to the sensitive question of evidence, which is the real stumbling block in any theory of fault responsibility in international law.<sup>29</sup> The present Commission would thus be well advised not to alter the scope of Draft Article 31, as it is now formulated, since it fulfils a central function both in theory and in practice.<sup>30</sup>

5. Even the doctrine which dispenses with the requirement of *mens rea* as a key element of the international wrongful act readily acknowledges a role for fault,

<sup>26</sup> See Ago, ‘La colpa nell’illecito internazionale’, in *Scritti giuridici in onore di Santi Romano* III (1940) 177, at 193; *Idem*, Eighth Report on State Responsibility, *Yearbook of the ILC* (1979, II, Part 1), paras 123 and 127.

<sup>27</sup> It was the decision of the Drafting Committee to merge the two articles into one, to omit any reference to ‘the author of the conduct’, to stress the influence of the said circumstances on the course of events and to strengthen the wording by adding the phrase ‘materially impossible’, see *Yearbook of the ILC* (1979, I), at para. 3.

<sup>28</sup> *Yearbook of the ILC* (1979, II, Part 2), at para. 25.

<sup>29</sup> See Simma, ‘Grundfragen der Staatenverantwortlichkeit in der Arbeit der International Law Commission’, 24 *Archiv des Völkerrechts* (1986) 357, at 370.

<sup>30</sup> The point has been clearly recognized by the Government of Austria in its comments and observations on the Draft Articles, although it criticizes the fact that ‘objective and subjective elements seem to be mixed in a manner likely to blur rather than determine the scope of force majeure or other external events as elements precluding wrongfulness’, see UN Doc. A/CN.4/488, at 90. In contrast, the French Government does not see any difference between force majeure and fortuitous event, viewed both as ‘objective facts’, and suggests that it be defined as an ‘irresistible, external and unforeseen event’. France’s strict position on force majeure is exemplified by its comment on Draft Art. 14 (now deleted by the ILC) on ‘Conduct of Organs of an Insurrectional Movement’, in relation to which the French Government suggested stating a presumption of state responsibility ‘while allowing for the possibility of exoneration in the event of force majeure (in the event of usurpation of government authority), see UN Doc. A/CN.4/488, at 40, 91 and 92.

according to its degree, in the assessment of the consequences of such an act.<sup>31</sup> The point is indisputable, since international practice provides clear evidence of it. More precisely, in the presence of wilful intent, there is a tendency to award compensation, even for remote consequences.<sup>32</sup>

Special Rapporteur Arangio-Ruiz, who brought the question of the relevance of fault as such in the Draft Articles to the attention of the ILC 10 years ago,<sup>33</sup> inexplicably flinched from taking a clear position on the point whether the presence and degree of fault should be taken into account in deciding upon the amount of reparation by compensation.<sup>34</sup> Instead, he concentrated on the partially different question of the impact of fault on satisfaction. He came to the conclusion that fault is relevant 'both with regard to the coming into play of satisfaction and to the quality and number of the forms of satisfaction'.<sup>35</sup>

The Commission did not completely follow the Special Rapporteur's approach. Whereas Arangio-Ruiz had stressed the role of fault for all forms of satisfaction by spelling it out in a specific paragraph,<sup>36</sup> the adopted Draft Article 45 avoids direct reference to fault and takes account of it in two different ways. Article 45, para. 2 lit(c) provides in cases of 'gross infringement of the rights of the injured State' for 'damages reflecting the gravity of the infringement', and lit(d) provides in cases of 'serious misconduct of officials or criminal conduct of officials or private individuals' for 'disciplinary action against or punishment of those responsible'.

It is doubtful whether the ILC's wording improved on the Special Rapporteur's text. As regards subparagraph (c), it is not clear by which criterion an infringement should be considered 'gross' — by its extent, by the material consequences it gave rise to or by its wilfulness.<sup>37</sup> It is only with the aid of the commentary that one learns that this last

<sup>31</sup> See L. Oppenheim, *International Law*, 8th ed., H. Lauterpacht (ed.) vol. I (1955), at 354: 'A great difference would naturally be made between acts of reparation for international delinquencies deliberately and maliciously committed, and for delinquencies which arise merely from culpable negligence'; R. Jennings and A. Watts (eds), *Oppenheim's International Law* vol. I (9th ed., 1992), at 532; I. Brownlie, *State Responsibility* (1983), at 46. For a somewhat different view see Decaux, 'Responsabilité et réparation', in Société française pour le droit international (ed.), *La responsabilité dans le système international* (1991) 147, at 190, who fears that the inclusion of individual fault would endanger the fragile building of state responsibility and brilliantly dismisses this approach as 'virtuous but unfortunate'.

<sup>32</sup> Cf. *Cresceri case (Italy v. Peru 1901, XV UNRIAA 452)*, where the umpire considered that Peru's responsibility for the killing of an Italian citizen by Peruvian soldiers was attenuated 'by the fact that it has not been proved that they opened fire intentionally and deliberately'; *Dix case (USA v. Venezuela 1903, IX UNRIAA 121)*, where the Arbitral Commission said that international law 'rejected compensation for remote consequences, in the absence of evidence of deliberate intention to injure'; *Venable case (USA v. Mexico 1927, IV UNRIAA 224)*, where the existence of 'outrage and wilful neglect of duty' were expressly qualified as 'aggravating circumstances'.

<sup>33</sup> Arangio-Ruiz, Second Report, *supra* note 21, at paras 164 *et seq.*

<sup>34</sup> *Ibid.*, paras 181–184.

<sup>35</sup> *Ibid.*, paras 185–188.

<sup>36</sup> See his proposed Article 10, para. 2 (Second Part of the Draft): 'The choice of form or forms of satisfaction shall be made taking into account the importance of the obligation breached and the existence or degree of wilful intent or negligence of the State which has committed the wrongful act.'

<sup>37</sup> The notion of 'gross infringements' brings about the same definitional difficulties of the newly envisaged notion of 'most serious breaches', see *supra*.

is the correct answer.<sup>38</sup> Furthermore, neither the text nor the commentary clearly states whether the subparagraph is intended to deal with punitive damages. As is well known, this is a controversial issue in international law.<sup>39</sup> One might not agree with Arangio-Ruiz, who positively singled out punitive damages as a form of satisfaction and related them to the existence or degree of fault.<sup>40</sup> A different, yet conceivable idea would limit the admissibility of punitive damages to international crimes, should this concept be retained by the Commission in one form or another.<sup>41</sup> However, what is at error here, in this author's opinion, is that the Commission should make a general statement in vague terms, without providing any explanation, on such a sensitive issue.

The Commission also made a mistake in including subparagraph (d) in an article on satisfaction. On the one hand, disciplinary action or punishment, or at least disavowal of officials, is not just the particular form which can assume the 'rather exceptional remedy' of satisfaction, as the Commission puts it, but the logical consequence of any case of officials' misconduct which entails the responsibility of the state. Nor can penal action against private individuals for criminal conduct detrimental to foreign states be considered a form of satisfaction, but rather the only means available to the state to live up to its obligation towards those foreign states and to avoid the imputation of that act to itself.

In only one article, namely Draft Article 42, does the Commission break with its prudence regarding the issue of fault; and curiously enough it does so in order to widen the scope of 'contributory negligence' on the part of the injured state (or nationals of that state on whose behalf the claim is brought) to all kinds of reparation,<sup>42</sup> unlike Arangio-Ruiz's proposal which was confined to issues of pecuniary compensation. Draft Article 42 expressly mentions negligence as well as wilful act or omission. The Commission's 'infraction' is explained by the same thinking which led to the development of Draft Article 31: it is the wrongdoing state which has the interest, and therefore the burden, to prove negligence or malice on the part of the injured state or its nationals so as to win a reduction in the amount of damages due.

<sup>38</sup> See *Yearbook of the ILC* (1993, II, Part 2), at para. 12.

<sup>39</sup> See Wittich, 'Awe of the Gods and Fear of the Priests: Punitive Damages in the Law of State Responsibility', 3 *Austrian Rev. Int'l and Eur. Law* (1998) 31.

<sup>40</sup> See Arangio-Ruiz, Second Report, *supra* note 21, at paras 140–145.

<sup>41</sup> In this sense see the comment of the Czech Republic on Draft Article 45, A/CN/4/488, at 111.

<sup>42</sup> See *Yearbook of the ILC* (1993, II, Part 2), at para. 7.