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# *From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility*

Marina Spinedi\*

## **Abstract**

*The article traces the progressive abandonment by the International Law Commission in the 1960s and 1970s of a strictly bilateralist conception of the legal relations arising from internationally wrongful acts of a state. This shift towards multilateralism, in contrast to the following period of codification work by the ILC, was limited to the consequences of wrongful acts which injure the fundamental interests of the international community (termed 'international crimes' by the ILC) and concerned solely the possibility of countermeasures (or sanctions) being adopted by subjects other than the state directly affected by the wrongful act. The author examines the reasoning which led Special Rapporteur Ago and the other ILC members to this move towards multilateralism and investigates whether this development can be linked to the positions taken by the ILC in the early 1960s regarding the invalidity of treaties contrary to jus cogens and the suspension/termination of multilateral treaties as a consequence of their breach, where such a shift towards multilateralism had already taken place.*

## **1 Introduction**

The Draft Articles on Responsibility of States for Internationally Wrongful Acts recently adopted by the International Law Commission (ILC) depart, in more than one respect, from an exclusively 'bilateralist' conception of the legal relations arising from a wrongful act. This is the case particularly, though not exclusively, in the areas

\* Associate Professor of International Law, University of Florence. Translated by Iain L. Fraser.

where the 1969 Vienna Convention on the Law of Treaties similarly departs from a purely ‘bilateralist’ conception: namely, (a) the legal consequences of the breach of obligations established by peremptory norms of general international law (*jus cogens*), which the Vienna Convention holds cannot be derogated from by treaty, and (b) the legal consequences of the breach of obligations established by certain multilateral treaties for states not ‘specially affected’ by the breach. Such treaties would at least in part seem to coincide with those whose material breach, according to the Vienna Convention, entitles parties ‘not specially affected’ to terminate them or suspend their operation.

The introduction of elements of multilateralism into the Draft Articles on State Responsibility is not a recent occurrence. Elements of multilateralism were already present, if not in the texts themselves of the articles adopted on first reading by the ILC in the 1970s, at least in the accompanying commentaries, particularly the commentaries to Articles 1 and 19, but also to Article 30.

The International Law Commission embarked on the process of codification of the law of treaties and the law of state responsibility practically in the same years. In 1950 J. L. Briery, first Special Rapporteur on the law of treaties, submitted his first report to the ILC, and in 1956 the first Special Rapporteur on state responsibility, F.V. García Amador, presented his. Until 1966, when the ILC adopted the Draft Articles on the Law of Treaties on second reading, both of these items were on the ILC agenda. Thus, the same people were dealing with codification of the law of treaties and of state responsibility. Moreover, several of those who had been ILC members during the preparation of the Draft Articles on the Law of Treaties were still members in the 1970s at the time that the ILC adopted on first reading the first provisions of the Draft Articles on State Responsibility.<sup>1</sup> It is well known that Roberto Ago, the Special Rapporteur under whose leadership these provisions were adopted, sat on the ILC from 1957 to 1978 and chaired the Vienna Conference on the law of treaties, but it should be recalled that other ILC members too worked on both Drafts. Suffice it here to mention the names of Bedjaoui, El-Erian, Elias, Reuter, Tabibi, Tsuruoka and Yasseen.

That being so, it seems natural to ask oneself whether and to what extent the discussions that took place at the ILC during preparation of the Draft Articles on the Law of Treaties, and later at the Vienna Conference, concerning *jus cogens* and the breach of multilateral treaties had an influence on the positions taken by ILC members in the debates on the consequences of internationally wrongful acts of states. More generally, one may wonder whether the reasons that induced the ILC to bring elements of multilateralism into the rules relating to the invalidity and suspension or termination of treaties are the same as those which led, when it came to codifying the rules on responsibility, to finding that there are obligations whose breach does not

<sup>1</sup> This was the title given to the Draft Articles on first reading. When the Draft Articles were adopted on second reading, the title was changed to ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’. This paper, dealing with the ILC’s work connected with the first reading, will use the title employed at the time.

concern only the ‘specially affected’ (or ‘directly injured’) state,<sup>2</sup> or whether, despite apparent links, the introduction of elements of multilateralism into the Draft Articles on State Responsibility follows a different (or partly different) logic from that underlying Articles 53, 60 and 64 of the Vienna Convention on the Law of Treaties.

I shall give a brief summary of the features marking the move beyond a strictly ‘bilateralist’ conception of international legal relations in opinions expressed by ILC members during the work on codification of the law of treaties, and go on to a closer analysis of opinions expressed during the first years of the work on codifying the law of state responsibility.

## 2 The Codification of the Law of Treaties (1950–1966): The Abandonment of an Exclusively ‘Bilateralist’ Conception of International Legal Relations

The move away from a strictly ‘bilateralist’ conception of international legal relations in the Draft Articles on the Law of Treaties prepared by the ILC may be most clearly seen in the assertion of the existence of: (a) rules of general international law that cannot be derogated from by treaty (*jus cogens*), and (b) cases where one party to a multilateral treaty can terminate it (or suspend its operation) even if the breach does not affect it directly.

### A *Invalidity of Treaties Conflicting with rules of Jus Cogens*

In the second report submitted by Hersch Lauterpacht to the ILC in 1953, and the first to deal with the topic of invalidity of treaties, it is stated for the first time that a treaty in conflict with certain fundamental principles of international law has to be regarded as void.<sup>3</sup> Draft Article 15 proposed by the Special Rapporteur provides for the invalidity of any treaty whose performance involves an act which is illegal under international law.<sup>4</sup> Although the wording of the article is different from that subsequently used by the ILC, and although the words *jus cogens* (or peremptory rule) do not appear in it, it is quite clear from the commentary accompanying the article that for the Special Rapporteur a treaty must be regarded as void if it conflicts with certain fundamental principles of international law. After indicating that ‘in principle, States are free to modify by treaty, as between themselves, the rules of customary international law’, Lauterpacht adds that a treaty must be regarded as illegal and consequently void if it is inconsistent with ‘such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international*

<sup>2</sup> This paper will use the expressions ‘states directly/indirectly injured’, and the equivalent expression ‘states specifically/not specifically affected by the breach’, since they were in current usage by ILC members during the initial work on codifying state responsibility. Use of these expressions, particularly ‘states directly/indirectly injured’, has been criticized by some scholars, and later by some ILC members. We shall return below, in Section 6, to this point.

<sup>3</sup> The first Special Rapporteur on the law of treaties, J. L. Brierly, dealt in his reports exclusively with rules concerning the conclusion of treaties.

<sup>4</sup> *ILC Yearbook* (1953), vol. II, at 154.

public)<sup>5</sup>. He mentions by way of example the rule prohibiting aggressive war and those prohibiting piracy (he in fact had in mind privateering) and the slave trade. Lauterpacht admitted that the article as proposed raised practical and theoretical difficulties, but felt that its inclusion should be regarded as essential in any codification of the law of treaties.<sup>6</sup>

The idea that any treaty conflicting with certain rules of customary international law should be regarded as void of validity was taken up again by the third Special Rapporteur on the topic, Gerald Fitzmaurice. In draft Article 17, submitted to the ILC in 1958, he referred in this connection explicitly to the distinction between rules of *jus cogens* and of *jus dispositivum*.<sup>7</sup> As examples of rules of *jus cogens* he mentioned the rule prohibiting the killing of prisoners of war, rules regarding protection of the individual, and the rule prohibiting wars of aggression.<sup>8</sup> The common feature of rules coming under *jus cogens*, or at least most of them, would be to involve not only legal rules but also considerations of morals and international good order.<sup>9</sup>

Neither Rapporteur thus seemed to have any doubt that, while it is the rule that two states can derogate as between themselves from rules of customary law, there are customary rules from which no derogation is permitted. We do not know whether ILC members shared these views, since the Commission, occupied with other topics, did not examine their reports.

The existence of rules of general international law from which no derogation is permitted was also accepted without difficulty by the fourth Special Rapporteur on the topic, Humphrey Waldock,<sup>10</sup> who made it the object of the draft Article 13 submitted in 1963. The draft article regards as void in particular treaties whose object or execution involves: '(a) the use or threat of force in contravention of the principles of the Charter of the United Nations; (b) any act or omission characterized by international law as an international crime; or (c) any act or omission in suppression or punishment of which every State is required by international law to co-operate'<sup>11</sup>.

This time the ILC thoroughly discussed the draft article.<sup>12</sup> All members taking the

<sup>5</sup> *Ibid.*, at 154–155.

<sup>6</sup> *Ibid.*, at 155.

<sup>7</sup> *ILC Yearbook* (1958), vol. II, at 27; for the commentary see *ibid.*, at 40–41. See also draft Article 22, also presented in 1958, concerning the effects of invalidity (*ibid.*, at 28) and draft Article 21, submitted in 1959, on *jus cogens superveniens* (*ILC Yearbook* (1959), vol. II, at 46).

<sup>8</sup> *ILC Yearbook* (1958), vol. II, at 40. Fitzmaurice adds that certain authors have mentioned the rules prohibiting piracy (in his opinion in fact intending privateering) and those prohibiting the slave trade. He seems to share their views.

<sup>9</sup> *Ibid.*, at 41.

<sup>10</sup> For Waldock, 'the view that in the last analysis there is no international public order—no rule from which States cannot at their own free will contract out—is increasingly difficult to sustain' (*ILC Yearbook* (1963), vol. II, at 52).

<sup>11</sup> Draft Article 13(2) (*ILC Yearbook* (1963), vol. II, at 52). Paragraph 1 of the article read: 'A treaty is contrary to international law and void if its object or its execution involves the infringement of a general rule or principle of international law having the character of *jus cogens*.' For the commentary, see *ibid.*, at 52–53. See also draft Article 1(3)(c), which defines *jus cogens*, *ibid.*, at 39, and draft Article 21(4) on *jus cogens superveniens*, *ibid.*, at 78.

<sup>12</sup> See the *ILC Yearbook* (1963), vol. I, Part One, at 62–78, 213–215, 314–315.

floor stated they were favourable to the introduction into the Draft of a provision for the invalidity of a treaty derogating from certain rules or principles of international law of fundamental importance. Additionally, no member maintained that no such peremptory rules exist in international law in force and that the draft article would be bringing in a notion as yet unknown to international law.<sup>13</sup> Of course, not all were in agreement on the wording used by Waldock, and there were divergent views regarding the exact notion of *jus cogens* and regarding which rules were at the time to be included in this category. Particular mention was made of the rules prohibiting genocide, crimes against humanity and aggression, but also of the rule establishing freedom of navigation on the high seas. Among those who stated they were favourable to the draft article was the future Special Rapporteur on state responsibility, Roberto Ago, as well as Bartoš, El-Erian, Tabibi, Tsuruoka and Yasseen, who all played a role in the codification of the rules of state responsibility. With the wording changed, the draft article was adopted unanimously on first reading in 1963, as Article 37. It read: 'A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.<sup>14</sup> The commentary listed as possible examples of such a treaty, one contemplating unlawful use of force in breach of the principles of the Charter, a treaty contemplating the performance of any other act criminal under international law or such acts as slave-trading, piracy or genocide, which require the cooperation of every state for their suppression. The commentary added that some members had referred to treaties violating human rights or the principle of self-determination.<sup>15</sup> The positions did not change on second reading in 1966.<sup>16</sup> The draft article was approved with the same wording, as Article 50.<sup>17</sup> With a few changes, it became Article 53 of the Vienna Convention.

### **B Termination or Suspension of a Multilateral Treaty as a Consequence of Its Breach**

Gerald Fitzmaurice was the first Special Rapporteur to deal with the question of the legal consequences of breach of a treaty. He dealt with it from two viewpoints: (a) the possibility of not performing an obligation established in a treaty, by way of legitimate reprisals in response to an 'ordinary' breach of the same treaty (as well as of an

<sup>13</sup> Most members seemed to regard the formation of such rules as something recent, but some felt by contrast that peremptory rules had existed even before the First World War. Among the latter was Ago, who referred to certain rules of the law of the sea (*ILC Yearbook* (1963), vol. I, at 75).

<sup>14</sup> *ILC Yearbook* (1963), vol. II, at 198. See also Article 45 concerning *jus cogens superveniens* (*ibid.*, at 211).

<sup>15</sup> *Ibid.*, at 199.

<sup>16</sup> See the Fifth Report by Waldock (*ILC Yearbook* (1966), vol. II, at 20–25, 44–45) and the debate in the ILC (*ILC Yearbook* (1966), vol. I, Part One, at 36–41, 87–91, 121–122; vol. I, Part Two, at 309–310, 331).

<sup>17</sup> The article was adopted with a vote against by Reuter and abstention by Briggs, who said they did not agree on the wording, though their disagreement was probably deeper. For the text of the article and the commentary, see *ILC Yearbook* (1966), vol. II, at 247–249. See also Article 61 and its commentary, *ibid.*, at 261.

obligation laid down in another treaty or by a customary rule) (draft Articles 18 and 20, contained in the fourth report, submitted in 1959)<sup>18</sup> and (b) the possibility of terminating a treaty (or suspending its operation) as a consequence of its fundamental breach. His second report presented in 1957 contained three draft articles on this point: draft Articles 18, 19 and 20.<sup>19</sup>

No shift away from a 'bilateralist' conception of international legal relations can be seen in the case of 'ordinary' breaches of the treaties: while it is not stated explicitly, it emerges from the commentaries that Fitzmaurice believes that only the state 'directly affected' by breach of a multilateral treaty is entitled not to observe a provision of that treaty (or where appropriate another treaty) by way of legitimate reprisals.<sup>20</sup> However, his position seems different when it comes to the case of fundamental breach of a multilateral treaty: he conceives, though in very limited cases, of the possibility for the other parties to suspend the operation of the treaty and even, in the event of violations so serious as to be tantamount to its repudiation, to terminate it. When he speaks of the other parties, Fitzmaurice seems to be including *all* the other parties, both those injured and those not specially affected by the breach.<sup>21</sup> Unfortunately, as noted,

<sup>18</sup> *ILC Yearbook* (1959), vol. II, at 45–46. Draft Article 18(1) read: 'In those cases where a reciprocal, equivalent and corresponding non-observation of a treaty obligation, following on a previous non-observation by another party to the treaty, as provided in article 20 below, would not afford an adequate remedy, or would be impracticable, the non-observance of a different obligation under the same treaty, or according to circumstances, of a different treaty, may . . . be justified on a basis of legitimate reprisals'. According to draft Article 20(1) 'By virtue of the principle of reciprocity . . . non-performance of a treaty obligation by one party to the treaty will, so long as such non-performance continues, justify equivalent and corresponding non-performance by the other party or parties'. For the commentaries on these two articles see *ibid.*, at 66 ff.

<sup>19</sup> *ILC Yearbook* (1957), vol. II, at 30–32. Draft Article 18(1) read: 'A fundamental breach of a treaty . . . or of any essential obligation under it, committed by one party, may, . . . in the case of a multilateral treaty . . . justify the other parties (a) in refusing performance, in their relations with the defaulting party, of any obligations of the treaty which consist of a mutual and reciprocal interchange of benefits or concessions as between the parties; or (b) in refraining from the performance of obligations which, by reason of the character of the treaty, are necessarily dependent on a corresponding performance by all the other parties, and which are not of a general public character requiring an absolute and integral performance'. For the commentaries on these articles see *ibid.*, at 52–56.

<sup>20</sup> In fact the Special Rapporteur does not deal with the question whether a distinction has to be drawn between states 'directly or specially affected' and 'not directly or specially affected' (or injured) by the breach of an international obligation. However, taking into account the examples he gives in the commentary to the articles and given the positions in legal literature of the times, it is justifiable to maintain that Fitzmaurice did not conceive of the possibility for those that would later be called 'not directly injured' (or affected) states not to comply, by way of reprisals, with an obligation arising from a treaty to which they were parties. Fitzmaurice's position in this respect is particularly interesting, since he was dealing with a question (the possibility for a state to engage in otherwise wrongful behaviour in response to a wrongful act previously committed by another state) that was subsequently to be regarded by the ILC as coming within the province of state responsibility and dealt with by it on that basis.

<sup>21</sup> Just as with 'ordinary' breaches, in the case of fundamental breaches of a multilateral treaty Fitzmaurice does not deal with the question whether one should distinguish between parties specifically and not specifically affected by the breach. However, in this case the conclusion which emerges implicitly from the text of the draft Articles 18 and 19 submitted in 1957 and the accompanying commentary is the contrary of that concerning ordinary breaches: it is reasonable to believe that in speaking of the 'other

the reports presented by Fitzmaurice were not considered by the ILC, so we cannot know what the views of its other members were.

The question of the possibility of terminating a treaty or suspending its operation in consequence of a breach was again considered by Sir Humphrey Waldock in his second report, presented in 1963,<sup>22</sup> and debated at length in the ILC the same year.<sup>23</sup> Waldock's draft Article 20 was approved on first reading, with amendments in 1963 (as Article 42).<sup>24</sup> It was adopted by the ILC, after further discussion and amendment on second reading, as Article 57 in 1966.<sup>25</sup>

At this stage of the ILC's work, the question of the possibility for parties not specifically affected by the breach of a treaty to terminate it or suspend its operation came under specific consideration. Two opposing positions were present: there were those who, like Verdross, felt that only the party that was victim of a breach of a multilateral treaty could suspend its operation towards the guilty party<sup>26</sup> and by

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parties' to the treaty entitled to refuse performance, Fitzmaurice meant to refer to every other party, be it or not specifically affected by the breach.

It will be noted in this connection that in dealing with cases where the parties to a multilateral treaty are entitled to refuse to implement a treaty following a fundamental breach by another party, Fitzmaurice distinguishes the case of breach of conventional obligations which he calls 'interdependent' from that of obligations he calls 'reciprocal'. The first are those which due to the treaty's nature are necessarily dependent on a corresponding performance by all the other parties. Fitzmaurice refers by way of example to the obligations established by a treaty on disarmament. The Special Rapporteur in this case implicitly admits the existence of obligations whose breach at the same time injures all parties to the treaty. Any party to the treaty would then, using the terminology later to be employed in connection with state responsibility, be 'directly injured'. It is natural that for Fitzmaurice in this case every party other than the defaulting State is entitled not to perform the obligations of the treaty.

But the same is true, it seems to me, also as concerns the breach of 'reciprocal' obligations. According to Fitzmaurice, 'reciprocal' obligations are those having as their object the mutual exchange of benefits or concessions between the parties. In the event of breach of such obligations one could conceive of the existence of parties directly affected by the breach and ones not so. And since even in the event of a fundamental breach of these obligations by one party, the Special Rapporteur acknowledges the right of the 'other parties', without distinction, to refuse to perform the treaty's obligations, it seems justifiable to conclude that he is referring to *all* the other parties, including those not specifically affected by the breach. This conclusion seems to me to be confirmed by the consideration that the reason why Fitzmaurice distinguishes in the draft Article 18 between the case of breach of interdependent obligations and breach of reciprocal obligations, is not that of establishing a distinction between parties entitled in response to a fundamental breach of the treaty not to perform the obligations resulting from that treaty, and parties not so entitled. The reason is to distinguish among parties *towards which* one is authorized not to implement the treaty. In the event of fundamental breach of interdependent obligations a party can suspend the treaty's operation or terminate it even in relations with the innocent parties, whereas in the case of breach of reciprocal obligations it may refuse to perform its treaty obligations solely in relations with the wrongdoing party.

<sup>22</sup> See draft Article 20 and the commentary on it (*ILC Yearbook* (1963), vol. II, at 72–73).

<sup>23</sup> See *ILC Yearbook* (1963), vol. I, at 120–132, 245–247, 294–295, 318–319.

<sup>24</sup> For the text of the article and the commentary, see *ILC Yearbook* (1963), vol. II, at 204.

<sup>25</sup> For the debates in the ILC, see *ILC Yearbook* (1966), vol. I, Part One, at 59–67, 127–129; vol. I, Part Two, 312–313, 332. For the text of the article adopted and the commentary, see *ibid.*, vol. II, at 253–255. See also the fifth report by Waldock, *ibid.*, vol. II, at 33–37.

<sup>26</sup> For Verdross's position see *ILC Yearbook* (1963), vol. I, at 294. On second reading his position was closer to the Special Rapporteur's (see *ILC Yearbook* (1966), vol. I, Part One, at 61).

contrast those who, like Waldock, felt that a material breach of a multilateral treaty affected all parties and entitled all to respond, both individually and collectively.<sup>27</sup> In other words, there was an opposition between a bilateralist conception of the obligations contained in treaties and a solidaristic conception of those obligations. The solution adopted, as we know, was to entitle, in the event of a material breach of a multilateral treaty by one party, (a) the ‘party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty . . . between itself and the defaulting State’; (b) parties other than the defaulting state (i.e. also those not specifically affected by the breach), ‘by unanimous agreement, to suspend the operation of the treaty or to terminate it either (i) in the relations between themselves and the defaulting State, or (ii) as between all the parties’; and (c) any party other than the defaulting state to ‘suspend the operation of the treaty with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party in relation to the further performance of its obligations under the treaty’ (see Article 57(2)). This solution was used without any changes in Article 60 of the Vienna Convention. In case (b), it enshrines a solidaristic conception of the obligations arising from a multilateral treaty.<sup>28</sup>

<sup>27</sup> In 1963 on first reading of the Draft Articles the Special Rapporteur had already taken this line. See the second report presented by Waldock (*ILC Yearbook* (1963), vol. II, at 72–77) and the exchange of views with Verdross (*ibid.*, vol. I, at 294–295). But it was particularly on second reading of the Draft Articles that he clarified his position. The United States Government had proposed in written comments amending Article 42 adopted on first reading so as to clarify that only parties whose rights had been infringed by the breach could, individually or collectively, suspend the treaty’s application or terminate it. Giving his reason for opposing this proposal, Waldock wrote: ‘. . . it seems necessary to bear in mind that the interests of one party may be seriously affected by the violation of the rights of another party; and also that every party to a multilateral treaty—even a treaty which is essentially bilateral in its application—has a certain interest in the observance of the provisions of the treaty by every other party. The basic hypothesis of the present article is, after all, that the offending State has committed a material breach of the provisions of the treaty, and it would seem undesirable to go too far in discouraging the other parties from showing solidarity with the party directly injured by the breach’ (*Fifth Report*, in the *ILC Yearbook* (1966), vol. II, at 36). See also his speech during the debate at the ILC (*ibid.*, vol. I, Part One, at 59–60). Waldock’s position was shared by the majority of ILC members, in particular by Rosenne, Castrén and Briggs (*ibid.*, at 60–62). Other members like Yasseen (*ibid.*, at 62), though in agreement that every party to a multilateral treaty has an interest in its being respected by all parties, felt that the party whose rights were injured had a more specific interest in seeing that its own rights were respected, and that this distinction ought to be brought out in the draft articles.

<sup>28</sup> In case (c), the ILC contemplates the material breach of a treaty establishing obligations of the type Fitzmaurice called ‘interdependent’. The example supplied by the ILC in the commentary is again a disarmament treaty. According to the ILC, breach of such a treaty by one of the parties ‘tends to undermine the whole régime of the treaty as between all the parties’ (*ILC Yearbook* (1966), vol. II, at 255). In this statement the ILC implicitly acknowledges, as Fitzmaurice had, that breach of the treaty by one party simultaneously injures all the other parties. Any party responding to the breach is accordingly, as in case (a), a party ‘specially affected’ by the breach. The reason for having a specific provision (as for Fitzmaurice’s one) has to do with the fact that the injured party is, in a case of treaty breach of type (c), authorized, on the basis of a unilateral decision, to suspend operation of the treaty not only in relations between itself and the guilty State, but also between itself and States that have committed no breach. As certain ILC members stressed, this is a cause authorizing suspension of the treaty that is close to that of a fundamental change of circumstances.



### 3 The First Attempt to Codify the Law of State Responsibility (1956–1961): ‘Bilateralism’ Remains

We have seen that in the 1950s there was already an opening towards multilateralism by the Special Rapporteurs on the law of treaties. Was this also the case for the law of state responsibility? The answer is a negative one.

The conception of Special Rapporteur F. V. García Amador remained a ‘bilateralist’ one: the relationship of responsibility was for him a bilateral relation established between the state guilty of the wrongful act and the injured state (or other injured subject<sup>29</sup>).

Yet García Amador had begun his first report (1956) by stating that international responsibility had undergone a profound transformation and that the traditional notion of international responsibility had to be re-examined in the light of new trends that had emerged in international law.<sup>30</sup> He had raised some of the questions that would subsequently lead the ILC to ‘multilateralist’ positions: namely, the question of the existence of serious wrongful acts, which he called ‘punishable’, entailing criminal responsibility, in opposition to ‘merely wrongful’ acts involving civil responsibility; the possibility of responsibility arising towards an international organization; and the existence of obligations concerning human rights protection.

But as to the existence of punishable wrongful acts entailing criminal responsibility, he was referring to responsibility that could be charged to a state organ.<sup>31</sup> As regards responsibility towards an international organization, he contemplated only the case of damage caused by a state to the organization’s own interests.<sup>32</sup> And regarding the impact of human rights protection rules on the law of responsibility, he concentrated on the content of the ‘primary’ obligations on states regarding the treatment of aliens (the state being obliged to assure foreign private individuals a treatment not inferior to the fundamental human rights recognized in international instruments),<sup>33</sup> as well as on the fact that the individual was henceforth in his view to be regarded as a subject of international law, so that the right of an alien to bring an international claim had to be acknowledged. The relationship of responsibility was for García Amador a relationship that had to be established, even at international level, between the state guilty of the wrongful act and the injured alien, without mediation of the state (save where the damage caused to the foreign individual was of such a nature as at the same time to injure a ‘general interest’ of the state).<sup>34</sup> Curiously, García Amador did not ask himself whether there exist obligations of states concerning treatment of their own

<sup>29</sup> García Amador was of the opinion that the state was no longer the only subject of international law. Individuals and international organizations had also become bearers of rights and obligations under international law. It followed that they could be both active and passive subjects of the international responsibility relationship (*ILC Yearbook* (1956), vol. II, at 188–192, 197–199). See also bases of discussion II and III set up by the Special Rapporteur (*ibid.*, at 219–220).

<sup>30</sup> *Ibid.*, at 174–177.

<sup>31</sup> *Ibid.*, at 182–183, 211–213. See also bases of discussion I and VI, *ibid.*, at 219–220.

<sup>32</sup> *Ibid.*, at 198–199. See also basis of discussion III, *ibid.*, at 200.

<sup>33</sup> *Ibid.*, at 199–203 and basis of discussion IV (*ibid.*, at 220).

<sup>34</sup> *Ibid.*, at 197–198. See also bases of discussion III and VII, *ibid.*, at 220–221.

citizens or the impact of such obligations on the responsibility of a state breaching them, as concerns the subject entitled to invoke such responsibility.

García Amador thus did not mention at all the possibility for subjects other than the state or individual injured to demand cessation, restitution or some other form of reparation in favour of the victim; still less did he contemplate the possibility for these subjects to take countermeasures or sanctions against the wrongdoing state. But two points should be highlighted in this connection. First, García Amador took the view right from his first report, though presented as being of a general nature, that the codification had to do with rules relating to state responsibility for injury caused to aliens. It was to this topic that his ensuing reports were devoted (from the second to the sixth), as were the draft articles he submitted to the ILC.<sup>35</sup> From this viewpoint it was indeed quite natural to conceive of the relationship of responsibility as being an exclusively bilateral one. Secondly, García Amador accepted a notion of international responsibility restricted to the obligation to make reparation (including eventually punitive damages) and the corresponding right of another subject to claim respect for that obligation. His vision of international responsibility, in other words of the consequences of the internationally wrongful act of the state, by no means included countermeasures adopted by states or sanctions by international organizations. He accordingly had no occasion to ask himself whether states other than the one directly affected, or international organizations, would in certain cases be entitled to take measures/sanctions against the guilty state.

The ILC was occupied with codifying other topics and did not manage to adopt any of the draft articles drawn up by García Amador. Yet it more than once embarked on a general debate on the subject.<sup>36</sup> During these discussions none of the ILC members seems to have wanted to depart from the conception of the responsibility relationship as being of a bilateral type. It is true, however, that the ILC members were concerned above all to assert that the alien could not be seen as a bearer of a right to claim reparation from the state, i.e. to bring an international claim, as well as to criticize the content of the state obligations, today called ‘primary’ obligations, concerning the treatment of aliens.

In conclusion, on the one hand the fact of limiting the content of state responsibility to the obligation to make reparation for damage precluded analysis of the question of countermeasures or sanctions that states or other non-injured (or ‘not directly injured’) subjects could adopt. On the other hand, the fact of treating as a possible source of state responsibility only the breach of obligations concerning the treatment of aliens easily explains why neither the Special Rapporteur nor other ILC members ever asked whether other states apart from the one whose citizen was injured could claim cessation of the wrongful act, restitution or some other form of reparation from the guilty state.

<sup>35</sup> The Draft Articles are reproduced in *ILC Yearbook* (1958), vol. II, at 71–73. A revised version of the Draft Articles can be found in *ILC Yearbook* (1961), vol. II, at 46–54.

<sup>36</sup> See *ILC Yearbook* (1956), vol. I, at 228 ff.; *ILC Yearbook* (1957), vol. I, at 154 ff.; *ILC Yearbook* (1959), vol. I, at 147 ff.; *ILC Yearbook* (1960), vol. I, at 264 ff., 276 ff.

## 4 The Debate on the New Path to Take in Codifying the Law of State Responsibility (1962–1969): The First Step away from an Exclusively Bilateralist Conception of the Responsibility Relationship

It is well known that the attempt to codify state responsibility embarked on with García Amador was destined to failure. In 1960 and 1961, at the General Assembly, the draft articles submitted by García Amador were the object of violent criticism from states, particularly the Socialist and Third World countries. The reasons leading to the failure were, on the one hand, disagreement on the content of states 'primary' obligations concerning the treatment of aliens, and the fact of having provided the possibility for the individual to bring an international claim; on the other, the request, put forward by the Soviet Union and subsequently by Third World countries, to deal with responsibility arising from the breach of the most important obligations of international law, particularly the prohibition on the use of force, rather than breach of obligations relating to the treatment of aliens.

Following these criticisms, the ILC went on, during 1962–1963, to intense discussion of how to tackle codification in this domain.<sup>37</sup> At the outset of the debate, the ILC decided to follow the pattern advocated by Ago, namely to codify only the 'secondary' rules on state responsibility, whatever the content of the obligation breached. The ILC also accepted Ago's idea that the notion of responsibility included not just the obligation to make reparation (in the broad sense), but also subjection to sanctions (reprisals and collective sanctions). Ago was appointed Special Rapporteur. The codification of state responsibility thus started up again, on quite new bases. It was at this point that the first, timid, opening to 'multilateralism' came.

Some of the ILC's members, while accepting the solution advocated by Ago, to codify only the 'secondary' rules on state responsibility, had insisted that in connection with the consequences of wrongful acts one should deal not just with those attaching to every wrongful act but also the specific consequences associated with the most serious wrongful acts. In this connection Ago was careful to clarify that he did not think that 'every distinction between the violation of certain rules and the violation of others is immaterial for the purpose of the consequent responsibility, or of believing that the consequences of infringement of a rule essential to the life of the international community should not be much more serious than those arising out of lesser infringements. [He believed] on the contrary, that logically this must be so'.<sup>38</sup>

When Ago talked of a differentiation in the consequences of wrongful acts it was mainly the content of the responsibility he had in mind (the possibility of subjecting a

<sup>37</sup> Following the 1962 debate (see *ILC Yearbook* (1962), vol. I, at 2–45, 286), the ILC appointed a subcommittee to make suggestions on how to tackle study of the matter. The subcommittee, chaired by Ago, held several meetings and drew up a report containing a programme of work (*ILC Yearbook* (1963), vol. II, at 227–237). The report and the programme of work were considered and approved by the ILC in 1963 (*ILC Yearbook* (1963), vol. I, at 79–86). See also the ILC report, *ILC Yearbook* (1963), vol. II, at 223–224.

<sup>38</sup> See the working paper submitted by Ago in 1963 (*ILC Yearbook* (1963), vol. II, at 253).

state guilty of particularly serious wrongs to sanctions, over and above the obligation to make reparation), not so much the subjects entitled to implement that responsibility. All the same, he took a first step towards accepting that subjects other than the state directly injured could implement the responsibility of the state guilty of the wrongful act. In the programme of work he submitted to the ILC, which approved it, he proposed that the question of collective sanctions be studied, and he mentioned the system provided for by the United Nations Charter.<sup>39</sup>

This opening up to the idea that the relationship of responsibility might be established with subjects other than the state 'directly injured' was a timid one, as noted above, because, first, it concerned only the second consequence of the wrongful act. Regarding the first (the obligation to make reparation), Ago did not feel that it was necessary to study whether states not directly affected by the breach might in certain cases claim reparation (in the broad sense). Second, Ago seemed to contemplate only the possibility of multilateral sanctions taken on the basis of a decision of an international organization, not that of sanctions (reprisals) to be adopted on the basis of a unilateral decision by states 'not directly injured'. It was thus in the framework of an international organization (especially the UN) rather than of customary law that they seemed to be located.

In 1963 the ILC adopted the Draft Articles on the Law of Treaties on first reading. Is this timid opening to multilateralism in the law of state responsibility to be brought into connection with the introduction into the Draft Articles on the Law of Treaties of the notion of *jus cogens*, or of the possibility for states not directly affected to terminate or suspend operation of a multilateral treaty as a consequence of its breach?

In my view it is hard to discern any direct effect of the debates on these themes on the discussions taking place at the same time in the ILC on state responsibility. All that can be said is that ILC members were increasingly aware of the fact that there are rules particularly important for safeguarding fundamental interests of the international community, and that these rules need special protection as regards both the possibility of derogation from them and the legal consequences to associate with their breach. Some of the examples, particularly the rule prohibiting use of force, coincide. One cannot, however, claim that the opening towards multilateralism to be found in the programme of work adopted by the ILC in 1963 is directly related to the debates on *jus cogens* or the termination of multilateral treaties. It was more the influence of the UN Charter's rules that was present.

It was some years later that direct influence of the work on codifying the law of treaties emerged. Being occupied with codifying other topics, the ILC had decided to not tackle immediately the codification of rules of state responsibility. In 1967, the ILC membership was quite different to that of 1963, so the Special Rapporteur asked members if they were in agreement with the programme of work adopted in 1963.<sup>40</sup> During the ensuing debate, Tammes noted that the programme did not deal with the

<sup>39</sup> See *ibid.*, at 253–254 for the programme of work submitted by Ago and *ibid.*, at 228, for the programme approved by the ILC.

<sup>40</sup> *ILC Yearbook* (1967), vol. I, at 225–228.

'active' subject of the relationship of responsibility, in other words, the subject entitled to assert the responsibility of the state guilty of the wrongful act, and added: 'Was that subject the injured State? Was it a State having a direct interest in seeing the legal situation restored, if possible? Did the individual interest of any party to a treaty in ensuring strict observance of that treaty in itself warrant initiating an action to impute responsibility, as was expressly provided in a number of instruments? Or was there a collective interest of a community of parties in the integrity of a treaty and, consequently, a collective active subject of responsibility?'<sup>41</sup> The influence of the rule adopted by the ILC concerning the breach of multilateral treaties is quite obvious here.

Other members joined Tammes. They asked for consideration to be given to whether international law ought to involve something similar to the *actio publica* in Roman law.<sup>42</sup> Replying to these speeches, Ago said that the question whether 'the time [had] come to draw away from the classical idea that the only subject of law entitled to assert the responsibility of the State was the person injured, and to recognize that there may be exceptional cases in which the international community as such was entitled to assert that responsibility . . . was very important, and should be taken into consideration'.<sup>43</sup>

The question of the subject authorized to assert the responsibility of states was again raised in 1969 during the debate on the first report submitted by Ago. Ushakov, citing Tunkin, stated that: '... it had formerly been held that violations of international law concerned only the State in breach and the injured State, whereas nowadays violations which constituted a breach or a threat of a breach of the peace affected the rights of all States. Hence, States other than the State directly injured might act in such cases to compel the offending State to abide by international law.'<sup>44</sup> In his reply Ago noted: '... a State whose subjective rights have been infringed might be incapable of imposing a sanction. Relations involving responsibility were established between the State committing the infringement and the State suffering the injury; but, even so, the infringement might be so serious as to concern the international community as a whole and to lead to the imposition of collective sanctions applied through international organizations, or to what had been called *actio publica*, an action instituted by a State other than the injured State with a view to adoption of measures against the infringement.'<sup>45</sup>

In the 1969 report to the General Assembly, the ILC indicated for the first time that a definition of the regime of international responsibility had a place for 'the separate consideration of the cases in which responsibility is reflected only in the establishment of a legal relationship between the defaulting State and the injured State and cases in which, on the contrary, a particularly serious offence may also give rise to the

<sup>41</sup> *Ibid.*, at 225.

<sup>42</sup> See the speeches by Ushakov, Ustor and Waldock (*ibid.*, at 225–228).

<sup>43</sup> *Ibid.*, at 227. This point was not taken up by the ILC, which confined itself to confirming the approval of the programme of work adopted in 1963 (*ibid.*, at 228).

<sup>44</sup> *ILC Yearbook* (1969), vol. I, at 112.

<sup>45</sup> *Ibid.*, at 241.

establishment of a legal relation between the guilty State and a group of States, or even between that State and the entire international community'.<sup>46</sup>

One can note the link (not present in Tammes' 1967 speech) set up between, on the one hand, the possibility for subjects other than the state directly injured to assert the responsibility, and, on the other, serious breaches of international law threatening fundamental interests of the international community. This link was to accompany all the work done by the ILC on state responsibility in the 1970s with Ago as Special Rapporteur.

## **5 The Move towards Multilateralism in the Work on the First Part of the Draft Articles on State Responsibility (1970–1980)**

One preliminary observation needs to be made: the question whether the responsibility relationship arising from the internationally wrongful act of a state is always a bilateral relation between the wrongdoing state and the state whose subjective right is infringed (or, if you prefer, the question whether the state's internationally wrongful act engenders new legal relations exclusively between the wrongdoing state and the injured state), or else is established with other states or other subjects too (whether they all be regarded as injured, indirectly injured or not injured) is one that the ILC was not called on to solve at this stage of the work. This was a problem connected with the preparation of the articles in the second part of the Draft, which was to be devoted to the content and forms of responsibility. In relation to the first part, devoted to the origin of responsibility, its task was at most to not pre-empt any solution it might wish to take into the second part of the Draft. The ILC was, then, to deal with the question of the subject entitled to assert responsibility in drafting Article 1, laying down the basic rule in the Draft. It dealt with it again, and especially when discussing Article 19 (providing for the category of international crimes of states) and Article 30 (on countermeasures as circumstance precluding wrongfulness), since it wanted to have an exchange of views on the consequences that might be associated, in the second part of the Draft, with international crimes and on the countermeasures system. The problem of determining whether there may be subjects other than the one directly injured entitled to implement the responsibility of the wrongdoing state was accordingly considered only indirectly, and ILC members' positions emerge not from the text of the articles adopted on first reading but from the commentaries accompanying them, from the Special Rapporteur's reports and from the debates.

<sup>46</sup> *ILC Yearbook* (1969), vol. II, at 233.

## A The Position of the Special Rapporteur and the ILC when Drafting Article 1

It was in 1970, when drafting his second report,<sup>47</sup> that Ago had occasion to ponder the question of the active subject of the responsibility relationship more attentively. Since he had to formulate the basic principle of the Draft Articles on the responsibility of states for internationally wrongful acts, it was necessary for him to consider the question of what was to be understood by the expression 'international responsibility of states'.

Having illustrated the scholarly positions on the point,<sup>48</sup> and noted that the conceptions of international responsibility, though different, 'nevertheless coincide in agreeing that every international illicit act creates new legal relations between the State committing the act and the injured state', he adds: 'this in no way precludes the establishment of other relations between the former State and other subjects of international law'.<sup>49</sup> Ago here takes up the position he had already sketched in 1963 again and clarifies it. For him it was especially in relation to the second consequence of the internationally wrongful act (subjection to sanctions) and in the conventional framework that there had been a move away from bilateralism.<sup>50</sup> But in the 1970 report he also asks whether the possibility of a move away from bilateralism should also be accepted in the context of customary law. In this connection he points to the growing tendency of certain authors to identify a category of wrongful acts 'so grave and so injurious, not only to one State but to all States, that a State committing them would be automatically held responsible to all States'. The Special Rapporteur brings

<sup>47</sup> See *ILC Yearbook* (1970), vol. II, at 177 ff. Ago's second report was subsequently incorporated into the third, appearing in *ILC Yearbook* (1971), vol. II, Part One, at 199 ff.

<sup>48</sup> Ago reduces the conceptions in doctrine to three: (a) the conception that the wrongful act gives rise to a bilateral legal relation setting the obligation on the State guilty of the wrongful act to make reparation (in the broad sense) against the subjective right of the injured State to require such reparation, (b) the conception that the legal consequence of a wrongful act is represented by the injured State's entitlement to apply sanctions to the State that committed the wrongful act, and (c) the conception, which he shared, that the internationally wrongful act could, according to the case, give rise either to the right of the State whose subjective right had been infringed to claim reparation from the guilty State, or the entitlement of the first State, or possibly a third subject, to inflict sanctions on the guilty State (see *ILC Yearbook* (1970), vol. II, at 180–183). On the various conceptions of international responsibility in legal literature, see the article by G. Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations', 13 *EJIL* (2002) 1083.

<sup>49</sup> *ILC Yearbook* (1970), vol. II, at 184. What he rules out is the possibility for general international law to create a legal relationship between the guilty state and the international community as such, since the latter is not personified.

<sup>50</sup> According to Ago, 'international treaty law [provided] that in certain cases a particular internationally wrongful act may be the source of new legal relations, not only between the guilty State and the injured State, but also between the former State and other States or, especially, between the former State and organizations of States'. And he stressed that the development of international organization had led, 'as early as the League of Nations, but more particularly with the United Nations, . . . to consideration of the possibility for a State committing an internationally wrongful act of a certain kind and of a certain importance to be . . . subject to the faculty, or even the duty, of the Organization and its members to react against the internationally wrongful conduct by applying sanctions collectively decided upon' (*ibid.*).

into relation with these views the statement then recently made<sup>51</sup> by the International Court of Justice in its judgment in the *Barcelona Traction* case that there are certain international obligations of states which are obligations *erga omnes*, i.e. towards the international community as a whole. Ago's position in this connection is, however, reserved. He asks whether the relationship set up in the cases considered with the generality of states would originate in a rule of customary international law or in a rule of conventional law, and whether the relation would be set up 'with States *ut singuli* or with states as members of an international organization which would alone be competent to decide on the action to be taken'.<sup>52</sup> He does not take a position, but it is fairly clear that he leans towards the second solution.

If Ago did not take a more precise stance, this was because for the purposes of drafting the basic rule in the Draft, the ILC had only to concern itself with adopting a formula that would not pre-empt the position it would decide to take later on the question of the active subject of the responsibility relationship.

The ILC considered the Special Rapporteur's second report in 1970 and 1973.<sup>53</sup> Since it did not have to take an immediate position on the question of the active subject of the responsibility relationship, only some of the ILC members mentioned it in their speeches, and without going into the question very deeply. It emerges, however, from these speeches that the majority of members were tending towards the idea that the relationship of responsibility arising from an internationally wrongful act is not always a bilateral relationship. Only Rosenne, among the members that took the floor, seems to have remained faithful to the idea that the active subject of the relationship is exclusively the state specifically affected by the breach.<sup>54</sup> None of the other members ruled out a move towards multilateralism. Some were very cautious. Thus, Tsuruoka asserted that cases where states not directly injured would be entitled to invoke the responsibility had to be limited,<sup>55</sup> and Reuter opposed the idea of a relationship being established with all states *ut singuli* in the context of customary law, though not ruling out the possibility in a conventional framework.<sup>56</sup> Other members, however, were decidedly favourable to dropping the idea of the responsibility relationship as an exclusively bilateral one. Some, like Sette Camâra, Tabibi and Alcívar, referred to the possibility of applying the sanctions provided for in the Charter in the event of a breach of fundamental principles of international law, and spoke of a relationship being

<sup>51</sup> The Court's judgment came in February 1970 and Ago's report in April the same year.

<sup>52</sup> *ILC Yearbook* (1970), vol. II, at 184.

<sup>53</sup> *ILC Yearbook* (1970), vol. I, at 175–192, 209–227 and *ILC Yearbook* (1973), vol. I, at 5–17.

<sup>54</sup> *ILC Yearbook* (1970), vol. I, at 220.

<sup>55</sup> *ILC Yearbook* (1973), vol. I, at 9.

<sup>56</sup> Reuter referred to the rights conferred on all States parties in the event of breach of certain regional treaties on human rights, and to the rights due by Article 60 of the Vienna Convention on the Law of Treaties to all parties to any multilateral treaty following its breach, but he takes care to stress that in the latter case the fullest rights are conferred solely on the State specifically affected (*ILC Yearbook*, 1970, vol. I, at 187–188). See also the position of Castañeda, who accepts the existence of obligations *erga omnes*, but is utterly opposed to allowing the adoption of sanctions decided unilaterally by one state even where it is the directly injured State (*ILC Yearbook* (1973), vol. I, at 10–11).



established with the organized international community,<sup>57</sup> and some, like Yasseen, Eustathiades and Ustor, spoke more generally of a relationship of responsibility established in certain cases with the whole international community.<sup>58</sup>

In 1973, following the debate, the ILC adopted, on first reading, Article 1 of the Draft. It read: 'Every internationally wrongful act of a State entails the international responsibility of that State'. In the commentary the ILC indicated that it was aware that there were differences of opinion as to the determination of the active subject of the relationship of responsibility, and specified that the term 'international responsibility' was meant to cover

every kind of new relations which may arise, in international law, from the internationally wrongful act of a State, whether such relations are limited to the offending State and the State directly injured or extend also to other subjects of international law, and whether they are centred on the duty of the guilty State to restore the injured State in its rights and repair the damage caused, or whether they also give the injured State itself or other subjects of international law the right to impose on the offending State a sanction admitted by international law.<sup>59</sup>

### **B *The Position of the Special Rapporteur and the ILC when Drafting Article 19***

Three years after the adoption of Article 1, the ILC had occasion to return to considering the question of determination of the active subject of the relationship of responsibility. The ILC had to draft the articles on the objective element of the internationally wrongful act, i.e. the breach of an international obligation. In this context it had to decide whether, having regard to the subject-matter of the obligation breached, it was appropriate to distinguish, within the overall category of internationally wrongful acts of states, between two categories of wrongful acts: 'ordinary' wrongful acts and particularly serious ones threatening fundamental interests of the international community. There is no need here to retrace the reasons that induced the Special Rapporteur to propose the distinction and the ILC to follow him along this path (see Article 19 of the Draft Articles adopted on first reading). What interests us here is that the establishment in the first part of the Draft Articles of a distinction between 'ordinary' wrongful acts (called 'delicts' by the ILC) and particularly serious ones (called 'international crimes' by the ILC) was to be the premise for a distinction, to be established in the second part of the Draft, between the responsibility regimes entailed by the acts, and that one aspect of the distinction<sup>60</sup> concerned, according to some upholders of the distinction, the active subject of the relationship of responsibility. In the case of the commission of international crimes, the subject entitled to implement the responsibility of the guilty state would be not only the state directly injured, but the whole international community (the formulas vary: some talk of the

<sup>57</sup> *ILC Yearbook* (1970), vol. I, at 183–184, 216.

<sup>58</sup> *Ibid.*, at 190–191, 210.

<sup>59</sup> *ILC Yearbook* (1973), vol. II, at 175.

<sup>60</sup> The other aspect, the one to which Ago and the other upholders of the distinction had mostly referred, concerned the content of the responsibility.

international community as a whole, others of all member states of the international community).

In the report he submitted to the ILC in 1976, where he proposes to introduce the distinction between international crimes and delicts, Ago makes a lengthy analysis of practice, international case law and scholarly works in order to prove that the international community had already established a distinction among wrongful acts. To this end, he refers—besides to the content of responsibility—to elements pointing to the abandonment, among members of the international community, of a purely ‘bilateralist’ conception of the legal relations arising from breach of obligations regarded as particularly important. Ago mentions that Article 53 of the Vienna Convention on the Law of Treaties establishes invalidity of a treaty conflicting with a rule of *jus cogens*; that Article 51 of the Charter recognizes the entitlement of third states to come to the aid of a state victim of armed aggression, even with conduct otherwise wrongful; that the Charter provides for a system of collective measures in the event of breach of certain obligations, particularly the one laid down in Article 2(4); that the International Court of Justice affirms, in the *Barcelona Traction* judgment, the existence of obligations (termed *erga omnes*) in respect of which all states have a legal interest.<sup>61</sup> Analysing the legal literature, he stresses that increasingly authors are talking of a relation of responsibility established in these cases with the international community as a whole (the organized international community for some; all states *ut singuli* for others).<sup>62</sup> Yet Ago once again avoids taking a stance on the views of these authors, and states that he only wished to supply the ILC with elements enabling it to judge whether it was appropriate in the first part of the Draft to draw a distinction among categories of wrongful acts, taking account of the importance of the obligation breached, knowing that by so doing it was committing itself to provide in the second part of the Draft for a distinction in the responsibility regimes attached to them.<sup>63</sup>

A review of the debate that took place at the ILC<sup>64</sup> shows that the idea that the relationship of responsibility arising from the most serious internationally wrongful acts is not exclusively of a bilateral type had become accepted by almost all the members. References to responsibility arising towards the international community or *erga omnes* in cases of serious wrongful acts are very frequent. It is less easy to establish what was the content of this responsibility according to ILC members. Most members refer to the system of collective sanctions provided for in the Charter (though some members raise doubts as to the possibility of regarding the measures provided for

<sup>61</sup> See the *Fifth Report*, in the *ILC Yearbook* (1976), vol. II, Part One, at 28–29, 31 ff.

<sup>62</sup> *Ibid.*, at 47–50.

<sup>63</sup> It was neither necessary nor useful, in Ago’s view, for the ILC to take a position, at the time of establishing the distinction, on the content of the responsibility arising from particularly serious wrongful acts or the question of the subjects entitled to implement it. It was when it came to drafting the part of the Draft on the consequences of wrongful acts that it would have to consider the question thoroughly (*Ibid.*, at 52). See also *ILC Yearbook* (1976), vol. I, at 60, 91.

<sup>64</sup> *ILC Yearbook* (1976), vol. I, at 55–91, 239–253.

in Chapter VII of the Charter as sanctions against a wrongful act).<sup>65</sup> Regarding the possibility for any state to take unilaterally decided measures of response, both the Special Rapporteur and the other members agreed that armed aggression by one state against another authorizes all other states (acting in accord with the victim state) to come to the latter's assistance by taking measures of self-defence (collective self-defence).<sup>66</sup> By contrast, ILC members did not seem yet to have a fully formed opinion on the possibility for any state to adopt unilaterally decided sanctions (subsequently termed countermeasures) against the guilty state. Some stress the dangers inherent in this solution. Most avoid any pronouncement. In this connection the Special Rapporteur finally makes his position explicit and declares his opinion to be that 'international crimes involved breach of an obligation *erga omnes*—one which concerned more or less directly all the members of the international community—and they should act in a co-ordinated manner'. He did not share the views of authors who claimed that 'any State was entitled to take individual action in such cases'.<sup>67</sup>

While having discussed the question of responsibility for serious wrongful acts, the ILC felt the issue would need further attention in the preparation of the second part of the Draft Articles, devoted to the consequences of wrongful acts, and stated that it shared the Special Rapporteur's opinion that it was not appropriate, in adopting the article enshrining a distinction between wrongful acts on the basis of the importance of the obligation breached, to take a stance already on the specific content of the regime of responsibility attached to serious wrongful acts. It was enough for it to have reached the conclusion that this regime should be different from that associated with all other wrongful acts. Consequently, in the commentary accompanying Article 19 the ILC confines itself to indicating that '[t]he forms of responsibility applicable to the breach of certain obligations of essential importance for the safeguarding of fundamental interests of the international community naturally differ from those which apply to the breach of obligations of which the subject-matter is different; and the respective subjects of international law permitted to implement (*mettre en oeuvre*) those various forms of responsibility may also be different'.<sup>68</sup>

One more step had been taken towards accepting cases where the relationship of responsibility was not one of a bilateral type, but once again the ILC, at least in the

<sup>65</sup> See *ibid.* the speeches by Calle y Calle (at 65–66), Sette Câmara (at 67–68), Vallat (at 68–69), Martínez Moreno (at 70–71), Ramangasoavina (at 75–76), Bedjaoui (at 80–82), Rossides (at 82–83), Ustor (at 83–84), El-Erian (at 85–88). Castañeda, while accepting that international crimes may entail application of the measures provided for in Chapter VII of the Charter, asked whether this is a true system of sanctions, or only of political measures (at 242). Kearney (at 76–77) and Tsuruoka (at 78) stressed that the application of the measures provided for in Chapter VII of the Charter corresponds to a political rather than a legal logic.

<sup>66</sup> See e.g. *ibid.* Martínez Moreno (at 70), Ago (at 90), and Castañeda (at 241). The position of ILC members emerges still more clearly from the debate in 1980 during drafting of Article 34 of the Draft, precluding the wrongfulness of conduct resorted to as self-defence in conformity with the United Nations Charter. The ILC's commentary to the article states that Article 51 in the Charter authorizes both individual and collective self-defence, and that general international law also does so (*ILC Yearbook* (1980), vol. II, Part Two, at 59). For the Special Rapporteur's position see *ibid.*, 1980, II, Part One, at 68).

<sup>67</sup> *ILC Yearbook* (1976), vol. I, at 90.

<sup>68</sup> *ILC Yearbook* (1976), vol. II, Part Two, at 117.

commentary to the article, did not take any definite stance. While stating that the forms of responsibility *differ*, in connection with the subjects entitled to implement the responsibility it says that they *may be different*. Questions left open are whether the move away from bilateralism applies to every wrongful act falling within the category of crimes,<sup>69</sup> whether it would have to do with the right for any state to claim reparation (in the broad sense) or to adopt sanctions or otherwise wrongful measures, and, in the latter case, whether every state could individually decide on the adoption of such measures or whether states not directly injured would be allowed to take them only in the context of an organized response (by the United Nations).

### *C The Position of the Special Rapporteur and the ILC when Drafting Article 30*

It was in 1979 during drafting of Article 30 on the exercise of countermeasures as a circumstance precluding wrongfulness that the Special Rapporteur and the ILC explicitly took a stance in favour of the existence of cases where the responsibility relationship is established with states other than the state directly injured. Allow me here to cite a passage from the Special Rapporteur's eighth report that well summarizes Ago's position on several of the questions that have been raised:

the former monopoly of the State directly injured by the internationally wrongful act of another State as regards the possibility of resorting against that other state to sanctions that would otherwise be unlawful, is no longer absolute in modern international law. It probably still subsists in general international law, even if, *in abstracto*, some might find it logical to draw certain inferences from the progressive affirmation of the principle that some obligations—defined in this sense *erga omnes*—are of such broad sweep that the violation of one of them is to be deemed an offence committed against all members of the international community, and not simply against the State or States directly affected by the breach. In reality no one can underestimate the risks that would be involved in pressing recognition of this principle—the chief merit of which, in our view, is that it affirms the need for universal solidarity in dealing with the most serious assaults on the international order—to the point where any State would be held to be automatically authorized to react against the breach of certain obligations committed against another State and individually to take punitive measures against the State responsible for the breach . . . the international community, in seeking a more structured organization, even if only an incipient “institutionalisation” should have turned in another direction, namely towards a system vesting in international institutions other than States the exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and thereafter, for deciding what measures should be taken in response and how they should be implemented.’ And he adds: ‘Under the United Nations Charter, these responsibilities are vested in the competent organs of the Organization.’<sup>70</sup>

<sup>69</sup> The ILC states that ‘it is . . . is very unlikely . . . that when the Commission considers the question of forms of responsibility and of the determination of the subject or subjects of international law permitted to implement (*mettre en oeuvre*) the various forms concerned, it will conclude that there is one uniform regime of responsibility for the more serious internationally wrongful acts’ (*ILC Yearbook* (1976), vol. II, Part Two, at 117). Bearing the Special Rapporteur's report and the ILC debates in mind, it is clear that ILC was referring to the possibility of distinguishing the regime of responsibility entailed by armed aggression from that entailed by other crimes.

<sup>70</sup> *ILC Yearbook* (1979), vol. II, Part One, at 43.

In the commentary to Article 30, the ILC took up almost verbatim these affirmations.<sup>71</sup>

## 6 Concluding Observations

We have sought in the foregoing pages to illustrate the path that Ago and the other ILC members took to find that new legal relations arising from an internationally wrongful act of a state are not always of a bilateral type. In the late 1970s, ILC members had become convinced that there exist cases where the relationship of responsibility arising from a wrongful act is established not just with the 'directly injured' state but also with other states (or other subjects of international law); in other words, that there are cases where subjects 'not directly injured' can assert ('implement', to use the ILC's terminology) the responsibility of the author state. A few remarks are called for on this point.

(1) The Special Rapporteur and the other ILC members had in mind, in talking of a relationship of responsibility established with subjects other than the one specially affected by the wrongful act, almost exclusively particularly serious internationally wrongful acts, which they called international crimes. They did not, with few exceptions,<sup>72</sup> by contrast with what was to come in the 1980s and 1990s, give consideration to the possibility that 'ordinary' wrongful acts could entail responsibility towards subjects other than that directly injured.<sup>73</sup> Are we to deduce that during the codification work carried out in the 1960s and 1970s ILC members ruled out that possibility?

The answer is not necessarily in the affirmative. As we have said, the ILC was not at that stage of its work asked to establish either what the content of the relationship of responsibility was nor between which subjects it was established. That was a task the ILC would have to tackle later, when drafting the articles for the second part of the Draft. It discussed whether subjects other than the ones specially injured could be active subjects of the relationship of responsibility almost solely in relation to international crimes, mainly because it had to decide whether it should distinguish a category of particularly serious internationally wrongful acts to which it would in the second part of the Draft have to attach different, more serious legal consequences than those resulting from all other wrongful acts.

<sup>71</sup> *ILC Yearbook* (1979), vol. II, Part Two, at 118–119.

<sup>72</sup> See e.g. the speeches by Tammes (*supra*, Section 4) and Reuter (*supra*, note 56), referring to the breach of certain multilateral treaties.

<sup>73</sup> ILC members did not, in particular, consider which were the subjects of the legal relationship entailed by the breach of obligations, whether conventional or customary, established for the protection of human rights, when these breaches did not constitute an international crime but an 'ordinary' wrongful act. By contrast, as from the 1980s, in the stage of the codification work with Special Rapporteurs Riphagen and Arangio-Ruiz, the ILC considered every breach of these obligations as constituting a wrongful act injuring simultaneously all the addressees of the rule laying down the obligation, and authorizing them all to invoke the responsibility of the guilty state.

Having said that, we must in my view make a distinction between the case of breach of conventional obligations and that of breach of customary obligations. Regarding breach of obligations arising from a treaty, the ILC's silence in no way proves that ILC members were not prepared to accept the existence of conventional obligations whose breach would entitle all the parties to the treaty—and hence all addressees of the rule establishing the obligation—to assert the responsibility of the state guilty of the breach.<sup>74</sup>

Instead, as regards breach of obligations arising from customary rules, which have all states as addressees, it emerges indirectly from the positions of ILC members that they felt that only serious breaches of obligations essential for the safeguarding of fundamental interests of the international community could entail responsibility towards all states (or the international community as a whole). It will be recalled that the fact of engendering responsibility towards all states (or towards the international community as a whole) is for Ago, as for the majority of other ILC members, one of the elements which allows a distinction to be made between the regime of responsibility arising from crimes (or certain crimes) and that arising from all other wrongful acts. This amounts implicitly to saying that in the case of 'ordinary' wrongful acts the responsibility relationship is established exclusively with the state directly injured.<sup>75</sup>

(2) Taking into account the notion of international responsibility adopted by the ILC,<sup>76</sup> when one says that already in the 1970s the ILC accepted that states not directly injured (all states or the international community as a whole) might implement the responsibility of the state guilty of certain wrongful acts, one might be referring either to the right of such states to claim reparation (in the broad sense) from the author state, or to entitlement to apply a countermeasure (sanction, in the terminology used until 1979) to it, or to both.

It is almost only in relation to entitlement for a state not directly injured to take a countermeasure, whether on the basis of a unilateral decision or of a resolution of an international organization, that the possibility for subjects not directly injured to implement the responsibility of the guilty state was considered by ILC members. By contrast with what was to happen after 1980, ILC members practically did not consider whether there were cases where every state might have the right to demand cessation of the wrongful act, restitution, guarantees of non-repetition, satisfaction or compensation. The reason for this attitude is bound up with the fact that the ILC concerned itself with determining the active subject of the responsibility relationship

<sup>74</sup> We may recall that Reuter admits this possibility, while he has difficulties in accepting the existence of internationally wrongful acts, however serious, that would on the basis of customary law engender responsibility towards all States (*ILC Yearbook* (1970), vol. I, at 187–188).

<sup>75</sup> This interpretation is confirmed by the consideration that the majority of ILC members were of the opinion that general international law prohibited only the gross violations of human rights (genocide, apartheid, slavery etc.) and that there were no customary rules established for the protection of the environment, except possibly the one forbidding massive pollution of common spaces. Breach of customary obligations concerning the protection of human rights or the environment accordingly coincided for them with the category of international crimes.

<sup>76</sup> See *supra*, Section 5A.

mainly when debating the legal consequences of international crimes, and later when drafting the articles providing for entitlement to take countermeasures and self-defence measures. It is accordingly not easy to know whether the Special Rapporteur and the other ILC members did or did not consider the possibility for states not directly injured to demand cessation, restitution, etc.<sup>77</sup>

Regarding the countermeasures that states not directly affected by the wrongful act could take on the basis of international law in force, Ago referred chiefly to the measures provided for in Chapter VII of the Charter. This view was shared by most ILC members. It will be noted in this connection that for Ago the measures provided for in Articles 41 and 42 of the Charter were measures taken in response to wrongful acts. These measures, while sometimes being mere retorsions, could also be countermeasures in the sense in which the ILC was using the term (namely, otherwise wrongful conduct taken against the state guilty of a wrongful act).<sup>78</sup> The Special Rapporteur and the ILC members further stressed that in the case of armed aggression the possibility existed, on the basis of both the Charter and customary law, for states that had not been victims of the aggression to come to the aid of the state attacked taking otherwise wrongful measures (measures of collective self-defence).<sup>79</sup> Apart from self-defence measures in the event of armed aggression, Ago doubts that customary international law authorizes states not directly injured unilaterally to decide on the adoption of otherwise wrongful measures, whereas other ILC members seem not to rule out this possibility.

Coming to the provisions on countermeasures to be provided for in the Draft—provisions which had not simply to codify customary law in force, but which could also contain elements of a progressive development—it is very hard to reconstruct what at this stage of the ILC's work were the views of the Special Rapporteur and of the other members, given that, as we have said, they did not wish to specify their views or

<sup>77</sup> It may only be presumed that those of the ILC members who approvingly cited the statement made by the ICJ in the *Barcelona Traction* judgment, that there are obligations in the protection of which all states have a legal interest, took the view that all states could demand at least cessation of the wrongful act and restitution.

<sup>78</sup> See esp. the *Eighth Report (ILC Yearbook (1979), vol. II, Part One, at 43–44)*. This position can be found again in the *ILC Report (ILC Yearbook (1979), vol. II, Part Two, at 119, 121)*. It will however be recalled that in the 1976 debate on the consequences of international crimes Castañeda had put forward doubts as to the nature as legal sanctions of the measures provided for in Chapter VII, recalling the position of those according to whom they were political measures (see *supra* note 65).

<sup>79</sup> For the sake of exactness it should be said that for Ago self-defence measures (individual or collective) differ from sanctions (countermeasures) (see *Addendum to Eighth Report in ILC Yearbook (1980), vol. II, Part One, at 15, 56–57*). Since Ago defines international responsibility as the situation of a state which has the obligation to make reparation and/or is subjected to a sanction (countermeasure), one might argue that it is not correct to say that for Ago subjection to self-defence measures is a form of the responsibility incurred by the state author of an armed aggression, and that in consequence one could not say that for Ago a relationship of responsibility is established between the state author of the aggression and all the other states. It nonetheless remains the case in my view that the relation established between a state guilty of aggression and those entitled to take self-defence measures corresponds to the notion of a 'new legal relation arising from the wrongful act', that is for Ago the essence of the notion of responsibility.

go further into the problem. However, at least as regards the Special Rapporteur one fact seems clear to me: Ago was opposed to providing the possibility for states not directly injured to take unilaterally decided measures (except in relation to self-defence measures). He envisaged a system of coordinated countermeasures (if possible in the context of an international organization), to be added to the one provided for by the Charter.

Still in connection with the content of the new legal relations arising from particularly serious wrongful acts, another point to stress is that in the 1960s and 1970s ILC members in no way considered the existence of obligations arising with all states other than the author of the wrongful act in case of very serious wrongful acts. We refer to obligations such as those not to recognize as lawful the situation arising from the wrongfulness, not to assist in maintaining that situation, and to cooperate in putting an end to it, etc. It was after 1980, during the work on the second part of the Draft Articles, with Willem Riphagen as Special Rapporteur, that the Commission began to consider this question.

(3) Throughout this paper we have used the term ‘not directly injured’ states to refer to states which, while also addressees of the norm laying down the obligation infringed, are not specifically affected by the breach.<sup>80</sup> The expression states ‘not directly injured’ and the corresponding one ‘directly injured’ state were used by ILC members in the stage of the work on codifying responsibility of states under consideration here,<sup>81</sup> but as we have said, use of these expressions was subsequently criticized, and the ILC dropped them. It was stated that the state could be either injured (in its subjective right) or not injured, but there were no intermediate positions. The provisions in the second part of the Draft Articles adopted on first reading, provisions drafted with the guidance of Special Rapporteurs Riphagen and Arangio-Ruiz, talk simply of ‘injured’ states even to refer to states previously called ‘not directly

<sup>80</sup> This terminology is connected with the opinion that there are international obligations whose breach simultaneously injures all addressees of the rule laying down the obligation, some directly and others indirectly. Thus, to refer to an example often given, in the event of breach by state A of the obligation set up by a customary rule (of general international law) not to commit an act of armed aggression, state B, the victim of the aggression, would be the ‘directly injured’ state and all other member states would be ‘indirectly injured’. Breach of the majority of international obligations would not bring this effect. For instance, in the event of breach by a state of the customary obligation to exempt from criminal jurisdiction foreign diplomatic agents, the state whose agent was subjected to jurisdiction would be ‘directly’ injured, while all other states would not be injured, whether directly or indirectly.

<sup>81</sup> The first to introduce the expression ‘state *directly injured*’ in the work on codifying state responsibility was Ushakov in 1969, citing a work by Tunkin (see Section 4 above). Special Rapporteur Ago initially did not use the expression (he asked whether states or subjects other than the *injured* party could take part in the relationship of responsibility). After 1970, and especially 1973, the expressions ‘states *directly injured*/states *not directly injured*’ were to be currently employed by both the Special Rapporteur and the other ILC members (though sometimes simultaneously with injured State/State not injured), and appear in the commentary to the articles adopted. Neither the Rapporteur nor the other members gave reasons for the choice of this terminology. It is clear that it was not so much a pondered choice on their part, underlying a given conception of the relation between one State’s obligation and another State’s subjective right, but more the use of an expression useful for immediately highlighting the difference between states more and less affected by the wrongful act.



injured',<sup>82</sup> which did not mean that according to the ILC the forms of responsibility that all injured states could implement would necessarily be the same.<sup>83</sup> On second reading of the Draft Articles, Special Rapporteur James Crawford and the other ILC members chose instead to talk in connection with these states of states 'not injured',<sup>84</sup> to whom international law nonetheless attributed the right to invoke some form of responsibility and possibly an entitlement to take measures against the guilty state. These states could, then, in this view too, be a party in the responsibility relationship, even though as non-injured subjects.<sup>85</sup>

The choice between one solution and the other underlies a differing conception of international norms and/or the subjects of international law, and entails differing implications.<sup>86</sup> It is not possible to consider these implications within the framework of this paper. For the purposes of interest here, suffice it to note that the various conceptions come together at least in accepting that breach of certain international obligations authorizes all states that are addressees of the norm laying down the obligation to implement (whether on the basis of a unilateral decision or in a coordinated manner) the responsibility (or certain forms of responsibility) of the state author of the breach; in other words, in accepting that the responsibility relationship arising from the internationally wrongful act is not always exclusively a relation of a bilateral type set up with the state specifically affected.

It is now time to answer the question raised at the start of this paper: What influence did the position taken by the ILC during the codification of the law of treaties have on the shift towards multilateralism in the initial work on codifying state responsibility?

As regards the work on breaches of multilateral treaties (and the resulting Article 60 of the Vienna Convention on the Law of Treaties), it may be stated that if it contributed, at the start of the codification work on state responsibility embarked on

<sup>82</sup> See Article 40 in the Draft Articles adopted on first reading (*ILC Yearbook* (1996), vol. II, Part Two, at 62–63).

<sup>83</sup> According to this conception, coming back to the example given in note 80 above, both the state that was the object of aggression and all other member states of the international community would be injured states, but certain forms of responsibility (for instance reparation for material damage suffered) could be claimed only by the former state.

<sup>84</sup> In the example given, the only state injured would be the victim of the aggression.

<sup>85</sup> See Articles 48 and 54 in the Draft Articles adopted on second reading (UN Doc. A/56/10).

<sup>86</sup> The first solution, whereby in certain cases all member states of the international community are injured states, responds to a conception according to which every international obligation of a state corresponds to a subjective right of one or several other subjects (and does not necessarily postulate the personification of the international community, or the international personality of the individuals). The second solution, according to which only the state specifically affected is injured, entails accepting the existence of obligations to which subjective rights of other subjects do not correspond, or else accepting the international personality of individuals and/or the international community as such. Consider the case of breach of the customary obligation not to commit an act of genocide. In the case where the victim of genocide is the population of the state perpetrating genocide, no other state is specifically affected. Choosing the second solution, one has to say that no other state is injured. Accordingly, either one accepts the existence of obligations to which no subjective rights correspond, or else that the subjective right infringed is that of the individuals who are victims of the genocide, and hence that individuals are subjects of international law, or that the subject injured is the international community as such, implying personification of the international community.

with Ago as Special Rapporteur, to drawing attention to the question of the active subject of the responsibility relationship, its influence was practically nil during the 1970s when drafting the provisions of the first part of the Draft. It was in the following stage of codification work, which came in the 1980s with Riphagen as Special Rapporteur, that Article 60 of the Vienna Convention and the foregoing ILC work on the breach of treaties were to play an important role in determining the subjects entitled to implement the responsibility of the guilty state.

On the contrary, the work on codifying treaty law in relation to *jus cogens* had a great influence in this connection. The influence was not, however, direct. The fact of considering that certain rules of international law are of such importance to the safeguarding of fundamental interests of the international community that no derogation by treaty can be permitted was one of the reasons that brought Ago and the other ILC members to find that protection of fundamental interests of the international community required strengthening the responsibility regime entailed by the breach of the rules protecting those same interests. 'It would be hard to believe', stated Ago, 'that the evolution of the legal consciousness of States with regard to the idea of the inadmissibility of any derogation from certain rules has not been accompanied by a parallel evolution in the domain of State responsibility'. He felt it was contradictory to treat as inadmissible derogation from rules protecting fundamental interests of the international community while considering that the only consequence for the state breaching these rules would be the obligation to make reparation for the damage caused to another state, and the corresponding right of the state directly affected to claim such reparation. The evolution in the legal consciousness of states must have led to provision for different, more effective responsibility regimes, and these regimes could have as a differential feature, *inter alia*, that of allowing responses by all states (or by the international community as a whole).<sup>87</sup>

The above argument, and the fact that the examples given by ILC members of peremptory rules and rules laying down obligations grave breach of which constituted a particularly serious wrongful act (international crime, in the terminology then used by the ILC) were largely the same,<sup>88</sup> ought, it would seem, to have brought ILC members to conclude that both categories of rules coincide in international law. Yet that was not the case. While some members took this view,<sup>89</sup> others (including the Special Rapporteur) held a contrary opinion. The category of

<sup>87</sup> See Ago's fifth report (*ILC Yearbook* (1976), vol. II, Part One, at 32–33) and the debate held at the ILC on the question of distinguishing between international crimes and delicts (*ILC Yearbook* (1976), vol. I, at 55–91).

<sup>88</sup> Among the examples of international crimes listed in Article 19 of the Draft adopted on first reading by the ILC are aggression, the establishment or maintenance by force of colonial domination, the practice of slavery, genocide, apartheid, and massive pollution of the atmosphere or the seas (*ILC Yearbook* (1976), vol. II, Part Two, at 95–96). Most of these examples correspond with those of rules from which no derogation is permitted supplied by ILC members in connection with codification of treaty law (see Section 2A above).

<sup>89</sup> Thus Tammes (*ILC Yearbook* (1976), vol. I, at 64), Calle y Calle (*ibid.*, at 65) and Vallat (*ibid.*, at 68–69). For Rossides any breach of an obligation laid down by a rule of *jus cogens* is a crime (*ibid.*, at 83).

rules of *jus cogens* seemed to them to be broader.<sup>90</sup> The ILC majority opted in 1976 for non-identity.<sup>91</sup> This latter position was to change in 2001, when the ILC adopted the Draft Articles on second reading: the ILC considered that the serious breach of any obligation arising under a peremptory rule entails a special regime of responsibility, including rights and obligations for all states.<sup>92</sup>

<sup>90</sup> See Ushakov (*ibid.*, at 71). For the position of the Special Rapporteur see *ibid.*, at 57, 75, 90. Cf. also the Fifth Report (*ILC Yearbook* (1976), vol. II, Part One, at 32, 53). Ago refers by way of example to the fact that according to some the obligation to respect diplomatic archives is a rule from which no derogation is permitted. Yet, breach of this rule could not be regarded as an international crime (*ILC Yearbook* (1976), vol. I at 75).

<sup>91</sup> In the commentary to Article 19 of the Draft Articles adopted on first reading, the ILC writes: 'it would be wrong simply to conclude that any breach of an obligation deriving from a peremptory norm of international law is an international crime, and that only the breach of an obligation having this origin can constitute such a crime. It could be accepted that obligations whose breach would be a crime will 'normally' be obligations deriving from rules of *jus cogens*, though this conclusion cannot be absolute. But above all, although it may be true that the failure to fulfil an obligation established by a rule of *jus cogens* will often constitute an international crime, it cannot be denied that the category of international obligations admitting of no derogation is much broader than the category of obligations whose breach is necessarily an international crime' (*ILC Yearbook* (1976), vol. II, Part Two, at 119–120).

<sup>92</sup> See Articles 40, 41, 48 and 54 of the Draft Articles adopted on second reading (UN Doc. A/56/10). In my view it is true that the category of peremptory rules and that of rules breach of which entails a severer responsibility regime need not necessarily coincide. In domestic law they do not: in private law certain rules cannot be derogated from by contract, but breach of them entails the same forms of responsibility as breach of peremptory rules. It remains to be seen, however, whether present-day general international law is sufficiently developed to allow identification of two categories of particularly important rules: those from which no derogation is permitted, but whose breach of which engages 'ordinary' forms of responsibility, and those which, besides admitting no derogation, entail special forms of responsibility if breached.