Review of the Spanish Literature in the Field of State Responsibility

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INTRODUCTION

The purpose of this review is to present a synthesis of the major points made since 1980 in Spanish literature[1] in the field of State responsibility as it appears in the Draft Articles on State Responsibility of the International Law Commission. In other words, the survey will be undertaken on the basis that the coverage is limited to the subject of State responsibility as currently understood in the Draft Articles, dealing with the issues covered by them but excluding the substantive primary rules dealing, for example, with injuries to aliens, except to the extent that this writer deems any literature on primary rules to have major implications

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[1] By "Spanish Literature" I understand any texts written in Spanish. I am aware that there are some important contributions to the field of State responsibility written by Spanish authors in other languages, but I will not include those in this review. See, for instance, J. A. Carrillo Salcedo, "Droit international et souveraineté des États. Cours géuéral de droit international public", *R. des C.*, vol. 257, 1996, pp. 35–222, particularly pages 196–210. Neither have I included works on International State Responsibility published after 1998, when this review was concluded. One last caveat: Latin American studies published after 1980 are difficult to catalogue. It was not my intention to exclude those works, but I had many difficulties to get them. Beside the article by F. Paolillo, included in the bibliography, I can quote, for example, H. Gutiérrez Posse, "Consideraciones sobre la responsabilidad internacional del Estado en el ámbito del ejercicio de las libertades y los derechos individuales" (Considerations on the International Responsibility of States in the Sphere of the Exercise of Individual Rights and Freedoms), *Lecciones y Ensayos* (Law School Journal of the University of Buenos Aires), 1992, pp. 19–31; and F. Villagrán Kramer, "La Comisión de Derecho Internacional y la responsabilidad internacional por crímenes internacionales" (The International Law Commission and International Responsibility for International Crimes), *Anuario Argentino de Derecho Internacional*, vol. VII, 1996–1997, pp. 153–166.

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for the Draft Articles as such.[2] Thus, for instance, material on the general distinction between "liability" and "responsibility" may be useful, but not extended discussions of substantive law relating to such matters as liability for environmental damage.[3]

The survey has two main parts. Part I is a general presentation of the issues discussed in the Spanish literature. In this Part, therefore, I will try to present critiques of, and suggestions to, the Draft Articles made by authors writing in Spanish. In Part II, I include a bibliography of State responsibility covering books, articles and treatises.

I will proceed directly with the contributions of Spanish literature to the work of the Commission. Nevertheless, let me start with a few remarks on the Spanish view of the general approach of the work of the Commission.

Spanish authors seem to accept the general approach taken by the Commission. Particularly, they are in agreement with the *general* nature of the codifying process,[4] and with the distinction between *primary* and *secondary rules*.[5] However, in the view of this reviewer, Spanish authors do seem to be

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[2] According to this approach, I will not include as a major point all the literature on responsibility focused on a particular substantive primary norm. An example of this is the prohibition of the use of force, particularly if one considers the fact that Spanish authors have devoted a great effort to study the issue of responsibility in connection with the determination of the meaning of the prohibition to use force in international relations. *See*, for example, C. Gutiérrez Espada, "La responsabilidad internacional del Estado por el uso de la fuerza armada" (The International Responsibility of the State for the Use of Armed Force), *Cursos de Derecho Internacional de Vitoria*, 1989, pp. 189–310; A. Rodríguez Carrión, "El elemento objetivo de la responsabilidad internacional por la violación de la obligación de abstenerse de recurrir a la fuerza" (The Objective Element of International Responsibility for the Violation of the Obligation to Refrain from the Use of Force), in C. Jiménez Piernas (ed.), *La responsabilidad internacional*, Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales, Alicante (1990), pp. 253–288. These and other publications on several substantive issues connected to the law of State responsibility can be consulted in the exhaustive listing of the Literature section of the *SYIL*.

[3] *See*, for example, J. Juste Ruiz, *Derecho Internacional del medio ambiente (International Law of the Environment)*, McGraw-Hill, Madrid, 1998; also V. Carreño Gualde, *La protección internacional del medio marino mediterráneo (The International Protection of the Mediterranean Marine Environment)*, Madrid, 1999.

[4] *See*, e.g., C. Jiménez Piernas, "La codificación del Derecho de la responsabilidad internacional: un balance provisional (1988)" (The Codification of the Law of State Responsibility: A Provisional Balance), in C. Jiménez Piernas (ed.), *La responsabilidad internacional (International Responsibility)*, Asociación Española de Profesores de Derecho Internacional y Relaciones internacionales, Alicante (1990), p. 35.

[5] *See*, for example, J. A. Pastor Ridruejo, *Curso de Derecho internacional público (Course of International Law)*, Tecnos, Madrid, 6th ed. 1996, p. 570. C. Jiménez Piernas, *supra* note 3, p. 27, says that the distinction has been beneficial for the codification project ("La distinción ha sido positiva para la buena marcha del proyecto").

critical and unsatisfied with what they deem a rather timid approach of the Commission on the issue of progressive development of the law of international responsibility.[6] This criticism can be noticed particularly in the case of the determination of the consequences of the *delict-plus* approach – this view will most certainly aggravate if the proposal to delete article 19 of the Draft Articles gain support from the Commission. Yet there is also a broader criticism: At least part of the Spanish literature on responsibility adopts a *structural* approach of analysis, distinguishing among a *relational* structure, an *institutional* structure and a *community* structure.[7] According to Jiménez Piernas, the Commission has adopted a State-centered approach, giving too much credit to the relational structure *vis à vis* the other structures.[8]

PART I

A. Opinions concerning Part 1 of the Draft Articles on State Responsihility

1. As to the General issues

As to the constitutive *elements* of an internationally wrongful act of a State, Spanish authors seem to agree with the approach of the Commission.[9]

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[6] *See* C. Jiménez Piernas, *supra* note 4, pp. 34–35.

[7] *See*, generally, J. D. González Campos, L. I. Sánchez Rodríguez and M. P. Andrés Sáenz de Santamaría, *Curso de Derecho intenacional público (Course of Public International Law)*, Madrid, Civitas, 6th ed. 1998, pp. 76–81.

[8] This is the main thesis of his presentation to the *XIII Jornadas de la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales* (1989), later published as "La codificación del Derecho de la responsabilidad internacional: un balance provisional (1988)", *supra* note 3. *See* also J. Juste Ruiz, "Responsabilidad internacional de los Estados y daños al medio ambiente: problemas de atribución" (International State Responsibility and Environmental Damages: Problems of Attribution), in *La responsabilidad internacional* (1990), pp. 113–136 (making a similar point in relation to problems of attribution in cases of international environmental responsibility).

Very recently, Jaume Ferrer Lloret, a disciple of Professor Jiménez Piernas, has published a book commenting and analyzing the second and third Parts of the Draft Articles as approved in 1996. This book adopts the same structural framework of analysis, and argues that the Commission recognized the relational structure, advance a little bit on the institutional structure, and failed on the task of creating the bases of the community structure. *See* J. Ferrer Lloret, *Las consecuencias del hecho ilícito internacional (The Consequences of the International Wrongful Act)*, Alicante, 1998, pp. 15–16, and *passim* (the main theses of this book will be presented in the following pages of this review).

[9] J. A. Carrillo Salcedo, *Curso de Derecho internacional público (Course of Public International Law)*, Madrid, Tecnos, 1991, pp. 180–183; M. Díez de Velasco,

In the usually problematic case of damage as a separate element, the authors are in agreement with the Commission on its decision not to articulate an autonomous requirement of "damage" as a separate element of an internationally wrongful act.[10]

2. As regards to the "act of State" under international law

All the textbooks describe the rules set up by the Commission without major critiques. The only book, based on a doctoral thesis of the author, that tackles one set of issues connected to problems of attribution and the subjective element of international State responsibility is due to professor Ma. Angeles Ruiz Colomé.

Indeed, in her book *Guerras civiles y guerras coloniales: el problema de la responsabilidad internacional* the author criticizes the Commission for being out of date and incoherent in its proposals on insurrectional movements and national liberation movements. Professor Ruiz Colomé argues in favor of the inclusion of new and more complex rules to deal with these movements. She says that the studies and conclusions of the Commission lack precision and completeness on this subject. She also accuses the Commission of not taking into account the real international practice concerning civil wars and decolonization – alleging that the Spanish Civil War and the Algerian decolonization are not good examples anymore. Let us summarize her main conclusions: The author says that articles 14 and 15 of the Draft Articles are out of date, because they do not take into account the present situation of insurrectional and national liberation movements. Besides, these articles do not consider the different causes and goals of the said movements. Ruiz Colomé's second major point refers to the scope of article 2(4) of the Charter of the United Nations. She discusses the scope and developments on the prohibition of the use of force in international law, particularly in order to affirm that today national liberation movements are legally recognized a right to use force in international law. She says literally that the use of force by national liberation movements has a "level of recognition and acceptance as high as the right to self-defense

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Instituciones de Derecho internacional público (Institutions of Public International Law), Madrid, Tecnos, 11th ed. 1998, pp. 664–670; J. D. González Campos, L. I. Sánchez Rodríguez and M. P. Andrés Sáenz de Santamaría, *Curso de Derecho intenacional público (Course of Public International Law)*, *supra* note 6, pp. 323–325; J. A. Pastor Ridruejo, *Curso de Derecho internacional público (Course of Public International Law)*, *supra* note 5, pp. 571–589 (the author gives a special treatment to wrongful acts of judicial organs on pages 586–589); A. Remiro Brotóns, R. Riquelme Cortado, J. Díez-Hochleitner, E. Orihuela Calatayud and L. Pérez-Prat Durbán, *Derecho internacional (International Law)*, Madrid, McGraw-Hill, 1997, pp. 417–432.

[10] *See*, e.g., C. Jiménez Piernas, *supra* note 4, p. 27.

recognized by article 51 to States" (p. 404). The author says that the Commission should analyze internal uses of force within the scope of article 2(7) of the Charter, and therefore, in principle, it is beyond the reach of international law. Ruiz Colomé says that the proposals of the former Rapporteur Ago on insurrectional movements are necessary, but incoherent with the international responsibility of States. The main reason for this judgment is that the Commission does not take into consideration two hypothesis: first, the responsibility of the State, which uses force against a people trying to exercise their right to self-determination; secondly, the responsibility of a new State for the wrongful acts of a national liberation movement during a colonial war against the administrative power. In conclusion, for this author it is erroneous to include national liberation movements within the consideration of insurrectional movements. She recommends that a new article on national liberation movements should be included in the Draft Articles on State responsibility.

3. As regards to the Breach of an international obligation

As already noted, Spanish authors welcome the normative distinction between delicts and crimes. Some opinions and suggestions are listed below.

A rather formal general point, with many substantive consequences, concerns the names for the distinction. In order to avoid the difficulties embedded in the name "international crimes", Carrillo Salcedo has proposed to call these special wrongful acts "illicit acts against the international community".[11]

Another general issue is the quest for *institutionalization*. Spanish authors urge the international community to create institutional frameworks to make this distinction operative – nevertheless, skepticism prevails on this point. Let me give a couple of examples from two major textbooks. Professor Pastor Ridruejo has written in his classic textbook on international law that the idea of international crimes merits a most favorable normative judgment. However, this author affirms that the concept needs institutional warranties to be operative and fair. He doubts that the Draft Articles with the necessary institutional framework will ever become a generally accepted international convention.[12]

The quest for institutional developments is also present in the treatise of Antonio Remiro Brotóns and his associates. He insists that any normative

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[11] J. A. Carrillo Salcedo, *Soberanía del Estado y Derecho internacional (State Sovereignty and International Law)*, Madrid, Tecnos, 2nd ed. 1973, p. 120. The expression in Spanish is "hechos ilícitos contra la comunidad internacional". *See* also J. A. Carrillo Salcedo, *La distinción entre crímenes y delitos internacionales. Una posible aportación iberoamericana a la codificacióny desarrollo progresivo del Derecho de la Responsabilidad internacional de los Estados (The Distinction between International Crimes and Delicts. A Possible Ibero-American Contribution to the Codification and Progressive Development of the Law of International State Responsibility)*, Publicaciones de la Secretaría General del IHLADI, Madrid, 1979.

[12] J. A. Pastor Ridruejo, *supra* note 5, pp. 576–577.

development should be accompanied by the necessary institutional frameworks; otherwise, those developments could serve a negative goal from the point of view of the impartial and objective application of the law.[13]

After the seminal writings of professor Carrillo Salcedo,[14] other authors have also studied the distinction between crimes and delicts in a specific way. Among these authors are Vilariños Pinto, Cardona Llorens, Alcaide Fernández, Blanc Altemir, Casado Raigón and Fernández Palacios.

Vilariños Pinto[15] analysis some issues related to the distinction between international crimes and delicts. The author affirms that Roberto Ago (Fifth Report of 1976) was right when he verified the existence of various regimes of international responsibility. However, as to the distinction between these two specific wrongful acts introduced by article 19 of the Draft Articles, the difficulties appear in the determination of the nature of the crimes and their specific regime. Therefore, Vilariños Pinto presents a critique of the definition of crimes (pp. 361–368), and discusses whether the term "international crime" is appropriate at all (pp. 368–373). For this author, the definition of article 19 has a tautalogical character. He shares the view of Professor Reuter when he affirmed that article 19 represents a promise of the Commission, but neither a special regime or a definition of international crimes. He concludes with a rather skeptical view of the distinction: without a background institutional legal structure, with power to judge the facts and adopt sanctions, the distinction between crimes and delicts has no meaning at all. The author, given this situation, proposes that the Commission should not define or qualify the wrongful acts of States, but only admit that some acts of States are to be governed by a particular regime of responsibility (p. 376).

In 1985, Cardona Llorens[16] wrote a rather general article to show that a "special" system of responsibility exists for gross violations of international obligations of an essential character, and to determine the content of that special responsibility. The answer of the author is in the affirmative: as article 19 of the Draft Articles on State Responsibility shows, there is a *special* regime of international responsibility for some illicit act of States.

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[13] A. Remiro Brotóns, *et al.*, *supra* note 9, p. 18.

[14] *See supra* note 11.

[15] E. Vilariños Pinto, "Consideraciones respecto a la configuración del crimen y delito internacional" (Considerations Regarding the configuration of the international crime and delict), *REDI*, vol. XXXIV, 1982, p. 357–377.

[16] J. Cardona Llorens, "La responsabilidad internacional por violación grave de obligaciones esenciales para la salvaguardia de intereses fundamentales de la comunidad internacional –'el crimen internacional'–" (International Responsibility for the Manifest Breach of Essential Obligations for the Protection of Fundamental Interests of the International Community – the International Crime –), *ADI*, vol. VIII, 1985, pp. 265–336.

Casado Raigon[17] gives a general review of the definition, and consequences resulting from, international crimes. The author supports the distinction between delicts and crimes, and goes further to affirm that it is a settled distinction in the field of international State responsibility. He believes that the origin of the distinction is due to a "progressive development" made by the Commission. However, he thinks that it is a prudent and well balanced progressive development.

Antonio Blanc Altermir[18] dedicated a book to study the substantive contents of international crimes. The book has three parts. Part I deals with the concept, nature and elements international crimes. Although it is a detailed study of those general issues, the author adopts a rather descriptive approach. In fact, he needs to determine that article 19 is closely connected with *jus cogens*, and that it does not content an exhaustive enumeration, to proceed with the following parts on the substantiation of the different types of international crimes. Part II studies the specific international crimes enumerated in article 19(3) (c) of the Draft articles on State Responsibility (slavery, genocide, apartheid). Part III studies some cases not included in the Draft articles, such as torture, forced disappearance of persons, and non-judicial executions.

Fernández Palacios, then a student at the Universidad Complutense of Madrid, reviewed the history of article 19 and its contents.[19] She discusses the basis for the distinction between crimes and delicts through State practice, jurisprudence and scholarly writings. As to the problems studied in the note, the author asks who should determine the existence of an international crime, and what legal regime should govern those crimes (sanctions, and *actio popularis*). She concludes that the distinction is a clear example of progressive development, which will be difficult to become real international law because it does not seems to fit well within the existing international society. However, she argues that maybe the Commission should spur international society to create institutions to live up to their norms.

4. As regards to the Circumstances Precluding Wrongfulness

Professor Carlos Jiménez Piernas (University of Alcalá) has made an important contribution to the study of the law relating to circumstances precluding wrongfulness in his book *La conducta arriesgada y la responsabilidad*

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[17] R. Casado Raigón, "La responsabilidad internacional resultante de la comisión dc un crimen internacional" (International Responsibility arising from the Commission of an International Crime), *Derecho y opinión*, 1992, pp. 103–130.

[18] A. Blanc Altemir, *La violación de los derechos humanos fundamentales como crimen internacional (The Breach of Fundamental Human Rights as an International Crime)*, Barcelona, Boscli, 1990.

[19] E. Fernández Palacios, "La distinción entre crímenes y delitos internacionales" (The Distinction between International Crimes and Delicts), *Revista de la Facultad de Derecho de la Universidad Complutense*, num. 66, 1982, pp. 169–197.

internacional del Estado.[20] In this book the author takes on the following question: Why the ILC has excluded from its Draft Articles the wrongful conduct of the victim as one of the circumstances precluding wrongfulness? Although there is a simple answer to this question (i.e., that the exclusion stems from the decision to include this problem in the context of the content and scope of the minimun standard of protection due to nationals of other States), the thesis of Jiménez Piernas is that wrongful and risky conduct should be included as one of the circumstances precluding wrongfulness in the law governing State responsibility. In other words, the purpose of his book is to demonstrate the validity of the wrongful and risky conduct as a circumstance that can modify the international responsibility of States. Assuming that the category exists, he studies three relevant moments in its operation: firstly, the risky conduct at the moment of diplomatic protection; secondly, the risky conduct when an international tribunal is considering the admissibility of a claim; thirdly, the risky conduct in the merits of the case. The best and most useful way to summarize this book is to translate the proposal of the author to introduce a new article to the Draft Articles on the "risky conduct" as a circumstance excluding or modifying State responsibility. Of course, today this proposal should be read taking into account the already approved Article 42.2 b) of the 1996 Draft Articles. Following is a full translation of the draft article proposed by the author, and a partial translation of its own explanatory commentary.

"Draft Article on risky conduct as a circumstance precluding wrongfulness[21].

The wrongfulness of an act of a State not in conformity with an

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[20] C. Jiménez Piernas, *La conducta arriesgada y la responsabilidad internacional del Estado (Risky Conduct and International State Responsibility)*, Alicante, Universidad de Alicante, 1988.

[21] The Spanish version of that Article reads as follows:

"La ilicitud de un hecho del Estado que no esté en conformidad con una obligación internacional de ese Estado quedará excluida, o bien atenuada su responsabilidad, si la víctima del mismo ha contribuido a que se produzca mediante la aceptación consciente y voluntaria de un riesgo previsible inherente a determinada conducta, sin necesidad de que medie dolo o culpa alguna de su parte.

El párrafo 1 no será aplicable si no se prueba la estricta relación de causalidad entre la conducta arriesgada y el hecho del Estado; así como la necesaria proporción o adecuación *in personam* e *in rem* del hecho del Estado a dicha conducta. Para ello, será necesario calificar la diligencia aplicada por sus órganos en cada caso.

No obstante lo establecido en el párrafo 2, puede darse excepcionalmente una relación de causalidad de carácter colectivo en relación con alguna colonia extranjera en ciertos conflictos internos vinculados al proceso de constitución y consolidación del Estado, sobre todo en la medida que exista una autoría directa por parte de particulares o grupos de particulares, y no de órganos estatales, de los daños o perjuicios causados a los extranjeros. Cabe reconocer incluso la ilicitud de estos hechos, pero en cualquier caso no le serán imputables a un Estado que pase por tales circunstancias".

international obligation of that State is precluded or lessened if the victim of that act has contributed to the result through the conscious and voluntary acceptance of a foreseen risk, which is inherent in a certain conduct. Neither *dolus* nor *culpa* is required.

Paragraph 1 shall not apply if there is no substantial evidence as to the causal relationship between the risky conduct and the act of the State, as well as the necessary proportionality and adequacy (*in personam* and *in rem*) of the act of the State to the said conduct. In order to decide on the fulfillment of these requirements, it will be necessary to deem the due diligence performed by the organs of the State case by case.

Notwithstanding paragraph 2, a causal relationship of a collective nature can exceptionally take place regarding a foreign colony in certain domestic conflicts associated with the process of constitution and consolidation of the State. This can happen particularly to the extent that there exist direct acts of private persons or groups causing damages or injuries to foreigners not attributable to organs of the State. The illicit character of these acts could be established, however they shall not be attributable to a State in the said circumstances".

"Commentary[22]

The modifying circumstance of the risky conduct of the victim or injured

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[22] Commentary:

"La circunstancia modificativa de la conducta arriesgada de la víctima o perjudicado, o en su caso del reclamante, desempeña un papel muy destacado en situaciones de *conflicto interno de tipo menor o intermedio*, sin que ello signifique que no se dé también en situaciones de paz interna, y su fin es evitar comunmente la atribución de responsabilidad al Estado sobre todo por actos de particulares contra personas y bienes de los extranjeros. La circunstancia juega particularmente en el momento de la protección diplomática, evitando que se conceda ésta de manera formal y estricta o reduciéndola a un protección de naturaleza humanitaria, en todo caso restitutoria pero nunca compensatoria. Es más, esta circunstancia puede desempeñarse asociada a la de la fuerza mayor y caso fortuito como causa de inimputabilidad del hecho ilícito en situaciones de conflicto surgidas durante el proceso de constitución y consolidación del Estado.

En cuanto a la relevancia normativa de esta circunstancia al tratarse del fondo del asunto, tercer y último momento del proceso seguido por una reclamación caso de su ideal solución jurisdiccional, la jurisprudencia demuestra que ya en relación con la circunstancia de la fuerza mayor y caso fortuito, o sólo con el cumplimiento por parte de los órganos estatales de su deber de diligencia mediando o no actos de particulares, dicha circunstancia consigue según los casos excluir la ilicitud o limitar la responsabilidad del Estado por un hecho ilícito tanto en situación de paz como de conflicto interno que no sea de *índole mayor*.

La *ratio legis* de esta circunstancia no es otra que contribuir *ad intra* y *ad extra* a la preservación de la seguridad del Estado y la estabilidad de sus relaciones internacionales, especialmente vulnerables en situaciones de conflicto interno, donde además ya resulta fácil apreciar la previa degración general del ejercicio de la protección diplomática *stricto sensu* en favor de nacionales extranjeros (...).

party, or claimant, plays a very important role in situations of minor or intermediate domestic conflict, but it could also take place in times of internal peace. The purpose of this circumstance is to prevent the attribution of responsibility to the State as a general rule, particularly for acts of private persons against foreigners and their properties. The circumstance plays a role particularly at the moment of the diplomatic protection, preventing its concession in a formal and strict way or changing its nature to a mere humanitarian protection that should be considered as a restitution, never as a compensation. Moreover, this circumstance may function associated with *force majeure* and fortuitous event precluding the wrongfulness of an act in situations of conflict emerged during the process of constitution and consolidation of the State.

In the merits of the case (...) the said circumstance excludes or limits the responsibility of the State for a wrongful act either in peace or during a domestic conflict, except for those of a *major nature*.

The *raison d'être* of this circumstance is to contribute, internally and externally, to the preservation of the security of the State and the stability of its international relations (...)".

Professor Jorge Pueyo Losa (University of Santiago de Compostela) has written two articles on reprisals. In the first one[23] he examines the validity and legality of reprisals as a circumstance precluding wrongfulness in international law. Reprisals are defined as measures, not involving the use of force, adopted by States to react against a previous illicit act of another State. The author underscores the importance of determining the limits and conditions under which reprisals are considered to be legal in international law. Therefore, a discussion of proportionality and peaceful means of dispute settlement takes

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La función eminentemente conservadora y estabilizadora de los sujetos estatales y sus relaciones que posee esta circunstancia explica que no se aduzca su hipotético efecto agravante de la responsabilidad. Al menos no nos consta en la práctica y jurisprudencia internacional estudiada; incluso entendemos que cuando se ha alegado la ausencia de la circunstancia en algunos precedentes ha diso más bien con el único fin de consolidar la falta de la prueba de la diligencia debida en el comportamiento de los órganos estatales implicados.

Todo lo expuesto no supone en rigor más que la radicalización de las funciones desempeñadas clásicamente por la categoría de la conducta arriesgada al como entonces se la conocía y situaba en el seno de la condición de las manos limpias. Y es probable consecuencia de la adaptación de los elementos constitutivos de dicha categoría a las nuevas condiciones de la sociedad internacional de nuestros días, en crisis manifiesta."

[23] J. Pueyo Losa, "El derecho a las represalias en tiempo de paz: condiciones de su ejercicio" (The Right to Reprisals in Time of Peace: Requirements), *REDI*, vol. XV, 1988, pp. 9–40.

place in his article. The second article is in fact a course,[24] and corresponds to an extended version of the article published in volume 15 of the *Revista Española de Derecho Internacional*.[25] The same concept of reprisals is used here as in the previous article. After a definition of reprisals in times of peace, Pueyo Losa studies two broad topics: first, reprisals and the use of force; second, economic reprisals and their relationship with international crimes. As to the latter issue, the author criticizes the vagueness and abstraction of the concept of international crimes as defined by the Commission (p. 125), particularly because it leaves open and indeterminate the problem of who has the right to undertake reprisals.

Professor Cesáreo Gutiérrez Espada (University of Murcia) has written a book to study the problems raised by the recognition of "state of necessity" as a ground for precluding the wrongfulness of an act not in conformity with the international obligations of the invoking State, when the use of force is involved.[26] Therefore, the main target of the book is to analyze the contents and limits of the substantive rule prohibiting the use of force as a peremptory norm of international law in the context of article 33 (2)(a) of the Draft Articles on State Responsibility. After dealing with different aspects concerning the definition of state of necessity as a circumstance precluding wrongfulness in international law, where he stresses the exceptional character of this circumstance precluding wrongfulness, and underscores the importance of the requirements of validity of the state of necessity, the author dedicates the main part of the book to determine the scope of the state of necessity as a circumstance precluding wrongfulness in the law of international responsibility. Leaving aside some areas – such as State debts, treatment to aliens and environmental protection –, the author studies the application of this exceptional case of exclusion of wrongfulness in situations involving the use of force. He maintains that the Commission is not too clear on this point. However, the author shares with the Commission the view that there is a core prohibition of the use of force (i.e., aggression), and some less clear cases in which low intensity uses of force may be accepted as valid under article 33 of the Draft Articles on State Responsibility (p. 88). Accordingly, Gutiérrez Espada proclaims that article 2.4 of the Charter qualifies, in principle, as a peremptory norm of general international law; nevertheless, he also argues that some uses of force may be invoked as a circumstance precluding wrongfulness in international law. He studies two cases: (1) colonial wars, and (2) protection of nationals abroad. He also examines some alleged exceptions to the prohibitions, such as hot pursuit,

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[24] J. Pueyo Losa, "Represalias, uso de la fuerza y crímenes internacionales en el actual orden jurídico internacional" (Reprisals, Use of Force and International Crimes in the Present International Legal Order), *Cursos de Derecho Internacional de Vitoria-Gasteiz*, 1988, pp. 45–147.

[25] *See supra* note 23.

[26] C. Gutiérrez Espada, *El estado de necesidad y el uso de la fuerza en Derecho Internacional*, Madrid, Tecnos, 1987.

humanitarian and pro-democratic interventions. In sum, the author accepts that there are some minor uses of force, distinct from self-defense and reprisals, that could be justified on the grounds of state of necessity.

Professor Cástor Díaz Barrado (University of Extremadura) has written a book on consent as a circumstance excluding wrongfulness, as provided for in article 29 of the Draft articles on State Responsibility.[27] The book, which adopts an analytical and explanatory rather than a critical approach, is divided into seven parts. A brief description of each part follows: Part 1 is introductory. It presents the limits of the research. Part 2 is a historical account of the attempts to codify consent as a circumstance precluding wrongfulness in international law. Part 3 deals with the nature and limitations (*jus cogens*, pp. 133–143) of consent as a circumstance precluding wrongfulness in international law. As to the nature, Díaz reaffirms the idea that consent is part of an agreement (pp. 122–128), and not a unilateral declaration (pp. 128–131). Part 4 tackles procedural questions concerning the manner in which consent could be requested; including consent provided by treaty norms (pp. 147–168), requests under defense agreements (pp. 169–188), specific international political understandings that may be understood as implicit consent (pp.189–211), and the mere request for help made by a State (pp. 213–220). Part 5 studies the very existence of consent, that will not be presumed, and its validity. The author argues that the Commission should establish the requirement that consent must be manifested in an express manner to be valid in cases involving the use of force (pp. 261–282). Part 6 deals with the difficult problem of legitimacy, i.e., who is authorized or has the power to give consent in international law. Part 7 analyses the legal effects of consent taking into consideration the moment in which it was expressed – only previous consent is clearly a circumstance excluding wrongfulness in international law.

B. Opinions concerning the Content, Forms and Degrees of International Responsibility, and the settlement of disputes.

The only systematic commentary on the second and third parts of the Draft Articles has been recently published by Jaume Ferrer Lloret (University of Alicante). His book[28] presents an analysis of the main topics of Parts II and III of the Draft Articles on State Responsibility approved by the Commission in 1996. The analysis is organized according to the typology of the so called normative structures of the international legal order, i.e. the relational structure, the institutional structure, and the community structure. The general thesis is that the Draft Articles on State Responsibility are based on the first structure

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[27] C. Díaz Barrado, *El consentimiento, causa de exclusión de la ilicitud del uso de la fuerza en DI* (*Consent as a Circumstance precluding the wrongfulness of the Use of Force in International Law*), Zaragoza, Prensas Universitarias Zaragoza, 1989.

[28] J. Ferrer Lloret, *supra* note 8.

(countermeasures are the most important example of this point), with a modest advancement of the institutional structure through the regulation of the settlement of disputes, and a total failure to develop a true community structure.

The first chapter studies the substantive consequences of the illicit act (cessation of wrongful conduct and reparation). In this chapter Ferrer Lloret criticizes the indetermination of this substantive consequences in the Draft Articles on State Responsibility. An example of this indetermination is the failure to focus the cessation of the wrongful act in the province of the primary obligation, in order to make a clear distinction with the *restitutio in integrum*. This problem appears again when the Commission enumerates the exceptions to the *restitutio in integrum*, particularly with the indetermination of the concepts of proportionality (Ferrer Lloret criticizes strongly the distinction between licit and illicit nationalizations in the Commissions Report, p. 180) and "political independence" or economic stability of the State. In the rest of the chapter, Ferrer also discusses the following issues: (1) the primary or secondary nature of the compensation; (2) the forms of satisfaction and its limits, particularly in cases where sanctions are imposed to individuals (Ferrer Lloret says that letter (d) of the Draft Articles is not sufficiently supported by practice); (3) assurances and guarantees of non-repetition (Ferrer seems to agree with the opinion that this article is not really necessary, because it is a repetition of art. 36); and (4) the introduction of negligence and *dolus* for the determination of reparation.

Chapter 2 analyses countermeasures. Ferrer Lloret admits that the evolution of international society does not permit great limitations on the right of States to adopt countermeasures. For this author, this is just another example of the relational character of the basic structure of the international society. Nevertheless, he stresses the problem of efficacy, particularly in connection with the inequality of States. He also argues that article 50(b) raises many doubts, and should be erased (p. 59).

Chapter 3 studies the provisions on dispute settlements. The author praises this part of the Draft Articles on State Responsibility as one of the most important steps towards the institutionalization of the international society (see, for example, p. 72: "la propuesta aprobada por la Comisión ... merece una valoración positiva"). However, Ferrer Lloret insists on the possible negative consequences of the mechanisms for the weaker States, since they can only present a claim before a judicial organ if they have been the objects of countermeasures.

Chapter 4 presents a review of the regulation of the consequences of international crimes. Ferrer Lloret argues that this part is the most clear example of the failure of the community structure. He cites to articles 51–53 to underline the brief and insufficient manner in which the Commission has dealt with the consequences of an international crime. Ferrer Lloret[29] underlines the fact that

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[29] *Id.*, p. 92.

most of the proposals of Arangio Ruiz have been set aside by the Commission, which has adopted a very cautious regulation of the consequences of international crimes. Admitting that the Commission did not have much time for the discussion of these articles, he nevertheless remarks the brief extension of the provisions and, particularly, the insufficiency of the practice cited in the commentaries of articles 51 to 53.

Chapter 5 contains the conclusions of the study. It is divided in two parts: Part I, entitled "codification versus progressive development of international law", underscores once again the idea that the Commission has been conservative, and that it has performed a "mere codification of international law" (p. 104). Part II stresses the "necessary work on the progressive development of international law" that the Commission has before it. He reaffirms his critique on the indetermination of the consequences of the commission of international crimes and, particularly, its delegation to the Security Council. However, Ferrer Lloret recognizes the main problems: first, that the Commission cannot amend the UN Charter; second, that any other less conservative proposal by the Commission would be rejected by the permanent members of the Security Council. He argues that the approach of the Commission should fall on the side of the progressive development of international law. In agreement with this idea, he finishes his book with a quotation by Arangio Ruiz (Fifth Report, p. 62), in which he alleges that international lawyers should adopt a progressive development position and let the States assume the responsibility of accepting or rejecting them.

Another study concerning Parts II and III of the Draft Articles on State Responsibility is that of Joaquín Alcaide Fernández.[30] The author, an Associate Professor at the University of Seville, argues that there is a confluence of the system of collective security provided for in Chapter VII of the Charter of the United Nations, and the regime of State responsibility in the field of international crimes. The problem is one of coherence, because those regimes operate with different codes. Indeed, one acts on the basis of politics and the other responds to legal rules. Nevertheless, the author remarks the presence of common interests reflected in the distinction between delicts and crimes, and the need for further institutionalization. The author deals with the performance of the Security Council of the United Nations in a detailed manner, particularly with the limits imposed by the Charter through its principles and purposes, and the possibility of an external political or legal control of the Council. As regards to the latter issue, Alcaide Fernández affirms that the ICJ should bear the responsibility of controling the legality of the Security Councils' acts. With

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[30] J. Alcaide Fernández, "El sistema de las Naciones Unidas y los crímenes internacionales de los Estados" (The United Nations System and the International Crimes of States), in P. A. Fernández Sánchez (coordinador), *La ONU, 50 años después*, Sevilla, Universidad de Sevilla, 1996, pp. 151–200.

words of Graefrath, he maintains that one must "leave to the Court what belongs to the Court".

A proposal by Professor Cardona Llorens[31] (University Jaume I) could also be included here for its probable importance regarding the consequences of wrongful acts. Cardona Llorens proposes to introduce a distinction between "legal obligations" and "legal duties" in international law. The latter category stems from the idea that there are norms that protect collective interests, from which "duties" for the States arise, but not subjective legal rights. The violation of a legal duty does not need a determined injured State, since the damage is made to the general interests of the international community. Consequently, other States have the faculty to react against violations of international legal duties, with the limits imposed by institutionalized reactions.

As to the opinions concerning the *Settlement of Disputes*,[32] although most commentators affirm that the Commission should have gone further in this part, in accordance with the proposals of Arangio Ruiz, they also recognize that the articles adopted on dispute settlement represent a great step forward in the determination of the law of State responsibility.[33] Spanish authors have always proclaimed that a well structured system of dispute settlement is absolutely necessary in any legal text governing State responsibility.

PART II

A. Books and articles on State responsibility

The following list covers more than just the literature described above in Part I. Those entries excluded from Part I receive a short description of their contents and/or the reason for their exclusion.

1. ACOSTA ESTEVEZ, J. B., "Normas de *ius cogens*, efectos *erga omnes*, crimen internacional y la teoría de los círculos concéntricos" (*Jus cogens* norms, *erga omnes* effects, international crime and the theory of concentric circles), *Anuario de Derecho Internacional*, vol. XI, 1995, pp. 3–22.

   This article is a theoretical discussion on the relationship between the concepts of norms of *jus cogens*, *erga omnes* effects, and international crimes. The author tries to clarify the scope of each of these different concepts, and to show how they overlap employing what he calls the theory of concentric circles. For him, *jus cogens* norms pertain to the system of sources of

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[31] J. Cardona Llorens, "Deberes jurídicos y responsabilidad internacional" (Legal Duties and International Responsibility), *Hacia un nuevo orden internacional y europeo. Homenaje al Profesor Manuel Díez de Velasco*, Madrid, Civitas, 1993, pp. 147–166.

[32] *See* also the comments of J. Ferrer Lloret, *supra* note 8.

[33] *Id.*

international law – they introduce a principle of hierarchy in international law. The *erga omnes* effects, the biggest circle, should not be mistaken with norms of *jus cogens*, since the former belongs within the principle of efficacy, not hierarchy. The concept of international crime is the smallest circle, it pertains to the field of international responsibility.

2. ALCAIDE FERNÁNDEZ, J., "El sistema de las Naciones Unidas y los crímenes internacionales de los Estados" (The United Nations System and the International Crimes of States), in Fernández Sánchez (coordinador), *La ONU, 50 años después*, Sevilla, Universidad de Sevilla, 1996, pp. 151–200.
3. BLANC ALTEMIR, A., *La violación de los derechos humanos fundamentales como crimen internacional* (The Breach of Fundamental Human Rights as an International Crime), Barcelona, Bosch, 1990.
4. CARDONA LLORENS, J., "Deberes jurídicos y responsabilidad internacional" (Legal Duties and International Responsibility), *Hacia un nuevo orden internacional y europeo. Homenaje al Profesor Manuel Díez de Velasco*, Madrid, Civitas, 1993, pp. 147–166.
5. CARDONA LLORENS, J., "La responsabilidad internacional por violación grave de obligaciones esenciales para la salvaguardia de intereses fundamentales de la comunidad internacional –'el crimen internacional'–" (International Responsibility for the Manifest Breach of Essential Obligations for the Protection of Fundamental Interests of the International Community – the International Crime –), *Anuario de Derecho Internacional*, vol. VIII, 1985, pp. 265–336.
6. CASADO RAIGÓN, R., "La responsabilidad internacional resultante de la comisión de un crimen internacional" (International Responsibility arising from the Commission of an International Crime), *Derecho y opinión*, 1992, pp. 103–130.
7. DÍAZ BARRADO, C., *El consentimiento, causa de exclusión de la ilicitud del uso de la fuerza en Derecho Internacional* (*Consent as a Circumstance precluding the wrongfulness of the Use of Force in International Law*), Zaragoza, Prensas Universitarias Zaragoza, 1989.
8. FERNÁNDEZ PALACIOS, E., "La distinción entre crímenes y delitos internacionales" (The Distinction between International Crimes and Delicts), *Revista de la Facultad de Derecho de la Universidad Complutense*, num. 66, 1982, pp. 169–197.
9. FERRER LLORET, J., *Las consecuencias del hecho ilícito internacional (The Consequences of the International Wrongful Act)*, Alicante, Universidad de Alicante, 1998.
10. FERRER LLORET, J., *Responsabilidad Internacional del Estado y Derechos Humanos (International State Responsibility and Human Rights)*, Madrid, Tecnos, 1998.
11. GUTIÉRREZ ESPADA, C., *El estado de necesidad y el uso de la fuerza en Derecho Internacional (State of Necessity and the Use of Force in International Law)*, Madrid, Tecnos, 1987.

12. HINOJO ROJAS, M., *Perspectiva actual de la responsabilidad objetiva en Derecho Internacional Publico (Present Perspective of the Strict Liability in International Law)*, Córdoba, Universidad de Córdoba, 1994.

    This book, based on the doctoral thesis of the author (now a professor of International Law at the University of Córdoba), is a general study of the liability of States for injurious consequences arising from acts not prohibited by international law. It falls outside of the reach of this review.

13. JIMÉNEZ PIERNAS, C., *La conducta arriesgada y la responsabilidad internacional del Estado (Risky Conduct and International State Responsibility)*, Alicante, Universidad de Alicante, 1988.

14. JIMÉNEZ PIERNAS, C., "La codificación del Derecho de la responsabilidad internacional: un balance provisional (1988)" (The Codification of the Law of State Responsibility: A Provisional Balance), in Jiménez Piernas (ed.), *La Responsabilidad internacional*, Alicante, Universidad de Alicante, 1990, pp. 17–94.

15. MARÍN LÓPEZ, A., *La responsabilidad internacional objetiva y la responsabilidad internacional por riesgo (International Strict Liability and International Responsibility arising from risk)*, Madrid, Eurolex, 1995.

    This book, written by an emeritus professor of law at the University of Granada, is a general study of the liability regime from the point of view of private international law. It falls outside of the reach of this review.

16. MARIÑO MENÉNDEZ, F., "Responsabilidad e irresponsabilidad de los Estados y Derecho internacional" (State Responsibility and Irresponsibility and International Law) , *Hacia un nuevo orden internacional y europeo. Homenaje al Profesor Manuel Díez de Velasco*, Madrid, Tecnos, 1993, pp. 473–487.

    This article is only indirectly connected to the secondary rules of State responsibility. The author is concerned with situations of irresponsibility of States as exemplified by the Alvarez Machaín case decided by the US Supreme Court in 1992. However, this article coincides with a general concern of the Spanish literature on the necessity of a compulsory system of dispute settlement that should be included in the articles of a future "convention" on State responsibility (p. 483).

17. PAOLILLO, F., "Reclamaciones colectivas internacionales: el caso de los damnificados por la crisis del Golfo" (Collective International Claims: the Case of the Damaged from the Gulf Crisis), *Hom. Jiménez de Aréchaga*, 1994, pp. 555–569.

    The article explains the nature and functions of the collective international claims under Security Council Resolution 687 (1991). It will be recalled that, according to Part E of that Resolution, Iraq was held "liable under international law for any direct loss, damage, including enrivonmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait." Resolution 687 also provided for the

creation of a fund to pay compensation for the claims mentioned above, and a Commission to administer the fund. Paolillo tackles two general issues concerning this mechanism: first, the scope of the functions of the Security Council: second the improvements made to the system of dispute settlement between a State and the nationals of another State. He concludes that the procedure for the examination and resolution of claims against Iraq resulting from Iraq's unlawful invasion and occupation of Kuwait is essentially a administrative one. This procedure is not exclusive and multilateral. There are neither parties nor judges; however, one can find some elements of due process, particularly when the complexity of the claim is high.

18. PONTE IGLESIAS, M. T., "El crimen ecológico internacional: problemas y perspectivas de futuro" (The International Environmental Crime: Problems and Perspectives), *Revista Española de Derecho Internacional*, vol. XVI, 1989, pp. 423–432.

    This article is concerned with the definition of international environmental crimes. It does not pretend to discuss secondary rules, but the author expresses her support to the distinction between crimes and delicts.

19. PUEYO LOSA, J., "El derecho a las represalias en tiempo de paz: condiciones de su ejercicio" (The Right to Reprisals in Time of Peace: Requirements), *Revista Española de Derecho Internacional*, vol. XV, 1988, pp. 9-40.
20. PUEYO LOSA, J., "Represalias, uso de la fuerza y crímenes internacionales en el actual orden jurídico internacional" (Reprisals, Use of Force and International Crimes in the Present International Legal Order), *Cursos de Derecho Internacional de Vitoria-Gasteiz*, 1988, pp. 45–147.
21. RUIZ COLOMÉ, M. A., *Guerras civiles y guerras coloniales: el problema de la responsabilidad internacional (Civil Wars and Colonial Wars: The Problem of International Responsibility)*, Madrid, Eurolex, 1996.
22. VILARIÑOS PINTO, E., "Consideraciones respecto a la configuración del crímen y delito internacional" (Considerations Regarding the configuration of the international crime and delict), *Revista Española de Derecho Inernacional*, vol. XXXIV, 1982, p. 357–377.

B. Textbooks on international law.

Most textbooks are directed towards students and, therefore, are logically focused on the explanation of general issues concerning the law of responsibility of States. The work of the Commission is generally presented in a descriptive way, without many critiques – though some of them criticize the Commission for being too vague and abstract when defining certain legal concepts, or being too conservative approaching issues demanding progressive development, or not determining legal consequences in a more progressive and detailed manner, etc. The following is a list of important textbooks in Spanish, which contain a chapter on the law of State responsibility.

1. CARRILLO SALCEDO, J. A., *Curso de Derecho internacional público (Course of Public International Law)*, Madrid, Tecnos, 1991.
2. DÍEZ DE VELASCO, M., *Instituciones de Derecho internacional público (Institutions of Public International Law)*, Madrid, Tecnos, 11th ed., 1997 (the chapter on State responsibility has been written by professor M. Pérez González of the Universidad Complutense, Madrid).
3. GONZÁLEZ CAMPOS, J. D., Sánchez Rodríguez, L. I. and Andrés Sáenz de Santamaría, P., *Curso de Derecho intenacional público (Course of Public International Law)*, Madrid, Civitas, 6th ed., 1998.
4. MARIÑO MENÉNDEZ, F., *Derecho internacional público (Public International Law)*, Madrid, Trotta, 2nd ed., 1995.
5. PASTOR RIDRUEJO, J. A., *Curso de Derecho internacional público (Course of Public International Law)*, Madrid, Tecnos, 6th ed., 1996.
6. REMIRO BROTÓNS, A., Riquelme Cortado, R., Díez-Hochleitner, J., Orihuela Calatayud, E. and Pérez-Prat Durbán, L., *Derecho internacional (International Law)*, Madrid, McGraw-Hill, 1997.
7. RODRÍGUEZ CARRIÓN, A., *Lecciones de Derecho internacional público (Lessons of Public International Law)*, Madrid, Tecnos, 4th ed.,1998.