Chapter XIX  Basic Considerations of Humanity in Relation to State Responsibility

I.  State Responsibility and the General Interests of the International Community

The international responsibility of the State has always appeared as a complex, truly central and fundamental chapter of Public International Law as a whole. The degree of consensus that is attained, or not, in relation to its multiple aspects, – starting with the very bases of the configuration of such responsibility, – is bound to reflect ultimately the degree of evolution and cohesion of the international community itself as a whole. Half a century of concerted endeavours to systematize this crucial chapter of International Law give reason, on the one hand, for satisfaction as to some advances achieved, and, on the other hand and at the same time, for concern as to the inconclusive – and at times unsatisfactory – results attained to date on some aspects of relevance to the international community as a whole.

The prolonged work of the U.N. International Law Commission [ILC] on State responsibility (1956-2001) disclosed, in fact, at least two significant features: the recognition of “the greater or lesser importance to the international community of the rules giving rise to the obligations violated, and the greater or lesser seriousness of the violation itself”.¹ The admission, by the ILC, that besides the directly injured States, also indirectly affected States may have a general interest to react to internationally wrongful acts, appeared to attempt to transcend the traditional paradigm in acknowledging the existence of general interests of concern to all States, to the international community as a whole.² In the same line of thinking, the ILC endeavours to regulate claims arising from the breach of obligations erga omnes (in cases of protection of human rights, or of collec-

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tive interests, under treaties) are likewise a step forward. An examination of the ILC’s prolonged work on State responsibility leads to the identification of basic considerations of humanity also in this domain of International Law (infra).

It may be recalled, to this effect, e.g., that when the ILC, as from the mid-seventies to the early eighties, engaged on the task, at a certain stage of its work on the subject, of listing grave violations to international peace and security (such as aggression), to the self-determination of peoples, to the safeguard of the human being (such as slavery, genocide, apartheid), to the protection of the environment (such as massive pollution of the atmosphere or of the oceans), – it followed the same method which it had previously adopted for the determination of peremptory norms of International Law in the ambit of its earlier work on the law of treaties, namely: to provide, for the determination of the obligations at issue, only a basic criterion, sufficiently clear so as to allow the crystallization around itself of international practice and case-law, and sufficiently flexible so as not to hinder “the development of the juridical conscience of the States”.

As it proceeded in its work (part II, rapporteur W. Riphagen) on the international responsibility of the States, the ILC clarified that it followed a “normative” approach and that it moved away from the old voluntarist conception of international law. This latter appeared incapable to solve the problem of the fundamentals and of the validity of international law, which could only find a response in human conscience itself; it was reckoned that it was “impossible to eliminate from the law” the idea of an objective justice, “superior to the facts”, and which disengaged itself from the very observation of the facts.

On the other hand, the ILC prolonged work which led to the adoption of its Articles on State Responsibility (2001) also disclosed in some aspects a certain resistance to the aforementioned construction of a new paradigm. An illustration is provided by the space occupied, in those Articles, by so-called “countermeasures” (Articles 22 and 49-54), in comparison with the much more succinct space devoted to serious breaches of obligations under peremptory norms of general International Law (Articles 40-41). Ubi societas, ibi jus. It should not pass unno-

3 K. Zemanek, “The Legal Foundations of the International System – General Course on Public International Law”, 266Recueil des Cours de l’Académie de Droit International de La Haye [RCADI] (1997) p. 266. By admitting that other States Parties may be regarded as “injured” (in those circumstances), the ILC moved into the gradual construction of a new paradigm.

