THE DRAFT ARTICLES ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS
The Work of the International Law Commission

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Since its establishment, the International Law Commission has been working on drawing up a set of draft articles on State responsibility, one of the fundamental areas of international law. In the course of this work, it successively appointed F.V. García Amador (1956-1961), Roberto Ago (1963-1979), Willem Riphagen (1979-1986), Gaetano Arangio-Ruiz (1987-1996) and for the second reading text James R. Crawford (1997-2001) as Special Rapporteurs. In 1996, the Commission completed the first reading of the draft articles which were submitted to States for comments and observations. In the light of these comments and observations and of the reports drawn up by James Crawford, based on developments in State practice, judicial decisions and doctrine, the Commission completed the second reading of the text. On 31 May 2001, the Plenary of the Commission adopted the draft articles on second reading with the only exception of two provisions dealing with assurances and guarantees of non-repetition. Thus, after more than 45 years of discussion, the Commission eventually succeeded in accomplishing its work on State responsibility.²

1 The decision on whether to include assurances and guarantees of non-repetition in the draft was left in abeyance until July 2001. The Commission made this decision dependent on the Judgement of the International Court of Justice in the LaGrand case between Germany and the United States which was delivered on 27 June 2001. Since the Court affirmed assurances and guarantees of non-repetition in principle, the Commission decided to retain them in the draft.

2 The final version of the draft is dated 26 July 2001.

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The Commission was certainly aware that the text achieved did not only constitute a codification *stricto sensu*, but contained also elements of progressive development. However, even as to these elements, it was thought that they already reflected a certain tendency within the international relations between States and were likely to be regarded as existing rules of international law in the near future. One of the core issues in this regard was the right of States other than the injured State(s) to take countermeasures; in this respect, the final text only contains a saving clause (Article 54).

The main characteristic of the draft is that it confines itself to secondary norms, *i.e.* that it does not define the substantive law applicable to breaches of international law. The main exception to this rule that was contained in the first reading text, namely the definition of crimes in article 19, was therefore replaced by a more formal provision dealing with what is called a serious breach of an obligation under a peremptory norm (Article 40). Likewise the draft does not take a stand on the issues of fault or damage as elements of the internationally wrongful act since both are considered to be aspects of the relevant primary norms concerned.

Up to the last moment, the Commission had difficulties in deciding on the further course the General Assembly should steer in dealing with this text. On the one hand, it was proposed to recommend the elaboration of a convention in view of the importance of this issue; on the other hand, fears were expressed that a codification conference could seriously jeopardise the delicate balance achieved in the draft by the possibility of amendments that might be put to the vote and reservations which might be submitted to a future convention. In the end, the Commission proposed the General Assembly first take note of the text and, only at a later stage, discuss whether a convention should be elaborated. For these reasons, the part on peaceful settlement of disputes, which was still contained in the first reading text, was omitted since such a mechanism would require the form of a treaty.

In sum, the draft articles as adopted by the International Law Commission may validly be considered as contributing to clarify the law of State responsibility and thus as a major step towards strengthening legal certainty in an area of international law which touches upon the very foundations of international relations.

The text reproduced below attempts to illustrate the development of the different provisions, in particular during the most recent quinquennium, by compiling the relevant draft articles of the text on first reading, the proposals by the Special Rapporteur James Crawford made in the course of the elaboration of the final draft text, the text adopted provisionally by the Drafting Committee of the International Law Commission in 2000 and the final text adopted on second reading by the Commission and submitted to the 56th General Assembly in 2001.