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David D. Caron
Berkeley Law

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THE ILC ARTICLES ON STATE RESPONSIBILITY:
THE PARADOXICAL RELATIONSHIP BETWEEN FORM AND AUTHORITY

By David D. Caron*

The adoption by the International Law Commission (ILC) in 2001 of its articles on state responsibility is an achievement that presents a paradox. This essay is about the form and authority of the articles, and the paradox that they could have more influence as an ILC text than as a multilateral treaty. The essay addresses the questions of the appropriate authority to be given an ILC text, why undue influence may be attributed to an ILC text (particularly by arbitral tribunals), and how an arbitral tribunal should approach interpreting and applying the articles on state responsibility.

The many members of the ILC, learned groups such as the Study Group on State Responsibility of the International Law Association (ILA) and the Panel on State Responsibility of the American Society of International Law, and government officials deserve our thanks for these articles. Probably no person deserves more credit for the thrust and content of the articles than Roberto Ago, one of the many special rapporteurs on the topic. Special thanks for the efforts of Professor James Crawford, the last special rapporteur, are also particularly appropriate. In addition, thinking about Crawford's achievement yields an important insight. He, like Ago, made a major contribution to the content and integrity of the articles, in his case primarily through streamlining the rules and making them more coherent. But perhaps even more important, Crawford deserves credit for getting the task done: for closing the deal.

That the adoption in itself was such a major achievement testifies to the unwieldy nature of the ILC and the controversial nature of some of the articles. Indeed, the scope of the issues addressed by these articles, the controversies, both scholarly and governmental, that surrounded certain provisions, and the cumbersome nature of the ILC had led many to conclude that its consideration of this topic could go on indefinitely. Crawford not only concluded the work; he did so professionally and with a minimum of diplomatic bloodshed, all the while coordinating the ILC effort with virtually every interested organization.

* Of the Board of Editors; Member of the International Law Association's Study Group on State Responsibility and the American Society of International Law's Panel on State Responsibility. Portions of this article were presented at the 2002 Annual Meeting of the American Society of International Law and benefited from the comments made there.

1 As to the institutional habits of the ILC, see generally the sources listed infra note 11. See, e.g., THE INTERNATIONAL LAW COMMISSION AND THE FUTURE OF INTERNATIONAL LAW 22-23 (M. R. Anderson, A. E. Boyle, A. V. Lowe, & C. Wickremasinghe eds., 1998) [hereinafter I.L.L.C. STUDY GROUP REPORT]; see also EDWARD MCWHINNEY, UNITED NATIONS LAW MAKING: CULTURAL AND IDEOLOGICAL RELATIVISM AND INTERNATIONAL LAW MAKING FOR AN ERA OF TRANSITION 226-27 (1984). In addition, in areas of a fast-changing world requiring legal innovation, the ILC may not be the most appropriate forum since by both design and habit the Commission is not particularly responsive to changing conditions. David D. Caron, The Frog That Wouldn't Leap: The International Law Commission and Its Work on International Watercourses, 3 COLO. J. INT'L ENVTL. L. & POL'Y 269 (1992).


The difficulty of concluding the ILC’s work on state responsibility suggests that the Commission’s adoption of the articles is not the end of the story. For decades, the international academic community looked forward to the completion of these articles. The international community now has before it the ILC’s collective opinion on the responsibility of states for internationally wrongful acts. The articles already have had, and will continue to have, tremendous effect on legal thinking, arbitral decisions, and perhaps state practice. But as the contributions to this symposium indicate, the articles are sometimes controversial and even more often unclear. The basic approach to the entire project and the choices implicit in particular articles continue to trouble some states and scholars. Several, if not many, of the articles clearly involve the progressive development of the law rather than its codification. Yet they are still quite influential. It is this influence amid controversy that is paradoxical. Given that the influence took hold even while the articles were only in the form of a partial draft, it is perhaps understandable that the ILC in the recommendation accompanying their adoption suggested that the United Nations General Assembly only “take note” of the articles for the time being, rather than immediately subjecting them to the unpredictable scrutiny of a diplomatic lawmaking conference. But it will be argued that the decision to eschew consideration of the articles as a treaty and to choose influence despite controversy raises fundamental questions about the ILC, arbitral decision making, and traditional images of the making of international law.

Three phenomena may be taking place. First, the ILC, perhaps from wisdom and perhaps from hubris, may be pushing the limits of its legitimacy to state what the law is. Second, the failure of some states to object to the General Assembly’s decision not to submit the articles to a diplomatic lawmaking conference may be an indication of how dysfunctional they perceive such a conference to be. Third, the arbitrators and other decision makers to whom the articles are addressed (particularly the former) may give too much authority (and therefore influence) to the articles. As best as I can determine, all three of these phenomena are present. The first and second are related; this essay identifies their presence and dimensions. This essay, however, is directed primarily at the third phenomenon: the form and authority of the articles, and, thus, their meaning to the arbitrators and decision makers who must apply the articles to the issues before them. My experience leads me to believe that these articles will have great influence in arbitration and other adjudicatory processes. Indeed, as discussed below, my concern is not that they will lack effect but, rather, that they will be adopted without sufficient probing by arbitral panels. This essay proceeds in the following fashion. Part I situates the ILC’s work on state responsibility within the context of the codification movement generally and of concerns regarding that movement. Part II then discusses the final debate in the ILC as to the form and authority of its project on state responsibility, and the action ultimately taken by the General Assembly on that work. Noting why the ILC and the General Assembly acted as they did, part II asks how this scholarly commentary on state responsibility, written as though it were a treaty, should be approached, tested, and elaborated upon by future arbitral panels and courts. Addressing these questions, part III considers the authority of the ILC’s work as a source of international law, and part IV discusses how the ILC text should be interpreted and applied.


Under Article 23(1) of the Statute of the International Law Commission, infra note 7:

The Commission may recommend to the General Assembly:

(a) To take no action, the report having already been published;
(b) To take note of or adopt the report by resolution;
(c) To recommend the draft to members with a view to the conclusion of a convention;
(d) To convocate a conference to conclude a convention.
I. A Preliminary Point on the Utility and Cost of Codification

Before considering the form and authority of the ILC's work on state responsibility, it is useful to situate that work within the broader current of codification generally. The adoption of the articles on state responsibility comes at the intersection of several fundamental trends in international society.

These articles appear at the end of one trend: state responsibility is the last significant area of the great effort to codify international law.6 The ILC's mandate in 1947, mirroring the General Assembly's authority under the Charter, was to codify and progressively develop international law.7 That mandate continued an effort dating from the mid-1800s to restate custom and, in doing so, to make it more precise and certain, and then from the end of the 1800s to restate this custom in multilateral treaties.8 The distinction between codification and progressive development is important. If one believes that the law "exists" independently of its articulation and that one is merely codifying that which exists, then one might leave that task to experts.9 In contrast, the task of progressive development of the law (i.e., legislation) might more appropriately be thought in the international arena to be the province of governmental negotiation.10 The ILC has played a central role since the Second World War in this codification and progressive development, addressing, for example, the law of treaties, the law of diplomatic immunities, and now the law of state responsibility.11

The ILC's work on state responsibility also accompanied a second trend: the increasing complexity in international actors—more states, more numerous and influential international organizations, regional groupings, indigenous peoples, and nongovernmental organizations. Finally, the drafting of these articles bridged the transformation of the Soviet Union in 1991 and the emergence globally of the market economy approach, which places a high value on alienable property rights. These last two trends may prove significant for the particular topic of state responsibility rather than codification generally.

These three trends, at least as far as these articles are concerned, may very well conflict with one another. It should be borne in mind that even as an area of doctrine is codified, the world it was intended to address may move on to a new form that tests the structure of the previous order.12 The effort to codify international law has always had critics in the background.

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7 Pursuant to the General Assembly's mandate under the UN Charter, Article 13(1)(a), the Assembly created the ILC via Resolution 174 (II) of Nov. 21, 1947. The original version of the ILC Statute was annexed to that resolution. Article 1 of the Statute charges the ILC with "the promotion of the progressive development of international law and its codification."

8 De Visscher called the nineteenth century the "century of codification." Charles De Visscher, La Codification du droit international, 6 Recueil des Cours 329 (1925) 1.

9 See, e.g., Tomuschat, supra note 2, at 705 (stating that "[t]he dichotomous mandate ... is based on a clear intellectual distinction. The objective of codification is not the creation of legal rules, but rather the collection, sorting, and refinement of such.").


12 McWhinney cautioned amid the East-West conflict, for example, that an "era of transition or revolution, such as we live in today . . ., is h...
questioning the wisdom of the effort. Their views are discussed more below, but in essence they reflect a concern with how the law should grow amid change. The changing array of international actors and the wider acceptance of the private market have placed new demands on our notion of the state even while the codification effort has finally reached the fundamental topic of state responsibility.

These tendencies raise a critical preliminary point: what is the utility of codification? Codification brings clarity to the law and therefore legal security. It enhances the capacity of the law to guide behavior. But it can also inject unwelcome rigidity. For this reason, the modern project of codifying the law has had its critics from the beginning. A particularly influential voice was Friedrich Karl von Savigny, who deeply opposed the call for the codification of German law in the early 1800s. For Savigny, Germany had not been liberated from Napoleon’s Code merely to impose one on itself. Mathias Reimann summarizes Savigny’s “polemic against codification”:

First, law is, like language, an expression of the “common consciousness of the people”; it is therefore essentially custom. Second, ... it grows organically over time, driven by “internal, silently operating powers”; it is thus an evolutionary phenomenon, subject to constant change, and can be properly understood only in its historical dimension.

In Savigny’s view, therefore, any codification would demand a thorough understanding of the fundamental principles underlying the law, an understanding he found lacking in his contemporaries. Reimann finds clear echoes of Savigny in James Carter’s criticism in the late 1800s of the proposed Field Codes for the state of New York. Edward McWhinney detects the same tensions in Canadian and Swiss constitutional debates in the 1960s and 1970s.

However, Savigny and his successors did not succeed in stopping the various codifications they opposed. It may be, as McWhinney has written, that there are “contemporary felt psychological needs which demand the production of elaborate written codes.” My own belief is that the impetus to codify is a manifestation of the broader drive to bring order to the world around us through institutions and law. In this sense, codification seems to be part and parcel of what social theorists have seen as the rise of bureaucracy in social order. Codification will occur. The question is how to get the most out of any codification effort.

The utility of a particular codification effort in terms of its ability to provide clarity to rules of law depends on several factors. First, a substantial degree of consensus in the view of the various states involved is probably needed for the law to be codified successfully. Second,
greater utility will result if the underlying subject matter is sufficiently stable to keep the codification from soon becoming out-of-date. Third, long-term utility is more likely if other mechanisms in society allow adaptation of the relatively inflexible codification. The first factor bears on the possibility of codification; the second and third, on its continuing utility. Thus, although national codes have had a freezing effect upon the law that thawed only with the passing of decades, this effect has sometimes been offset by the ability of legislatures through statutes (or courts through decisions) to adapt the law to changing circumstances. It is essential to recognize that internationally, the freezing effect of a code may be greater because the system lacks both a legislative body to amend the codes and an authoritative judiciary with jurisdiction over enough cases to adapt them to new circumstances and needs.

In the case of state responsibility, the original focus of the ILC on responsibility for injuries to foreigners revealed a profound lack of consensus, at least at that time. The Ago shift in focus to trans-substantive rules avoided such a pervasive lack of consensus, but one needs to consider whether that is partly explained by Ago’s abstract formulation of the topic. Indeed, the aspects of the project that did not elicit consensus, such as international crimes and countermeasures, were arguably the least abstract of the topics addressed. Finally, the entire subject addressed by state responsibility may possibly be shrinking in its scope of application, as well as changing in some more fundamental, yet unidentified way. For example, the concept of “governmental authority,” present in many of the articles concerned with attribution, is not only undefined but elusive when pursued.

All of these considerations suggest to me that codification of the law of state responsibility is a risky proposition. A better approach might be an authoritative scholarly statement of the law that would provide some guidance and clarity, yet also grow and change as it confronted the tests that the world will present. At first blush, the ILC’s recommendation, accepted by the General Assembly, not to attempt at present to call a diplomatic lawmaking conference to consider a multilateral treaty would seem to harmonize with this idea of an authoritative scholarly statement that can change and grow. It might, as Georges Abi-Saab has written, provide “recourse to presumptions—to legal fictions—in order to enhance the development of international law.” However, I will argue that the dynamics of decision making in arbitral tribunals and the fact that the ILC study is written as though it were a treaty in many instances will not result in its being a document that changes and grows with the testing of particular cases, but one that is inappropriately and essentially accorded the authority of a formal source of law.

II. THE ILC’S DEBATE AND THE GENERAL ASSEMBLY’S ACTION ON FORM AND AUTHORITY

The endgame of the ILC’s forty-plus year effort to draft articles on state responsibility deserves close examination. As the ILC worked over these many years, the draft had the consensus may also benefit from a legal order, but a politically dominated legislative process rather than an expert-dominated codification process will likely be perceived as more legitimate.

Lauterpacht offers a thoughtful discussion on the necessary conditions for codification by distinguishing between those situations where there is no consensus “due to conflicting interests,” and those where there is no consensus simply because there is—amid uncertainty—divergence of practice “of little moment” to the states. Hersch Lauterpacht, Codification and Development of International Law, 49 AJIL 16, 23-27 (1955). In this regard, see also H. W. A. Thirlway, International Customary Law and Codification 21-23 (1972).
look and feel of a treaty. The question of the form that the project would ultimately take was repeatedly deferred to the end. At the end, the ILC adopted a treatylike text containing fifty-nine articles with a lengthy commentary annexed, but did not recommend to the General Assembly that the articles be considered for adoption as a treaty.

Draft conventions are the dominant working style of the ILC. It could use other forms of documents and could look to other final products. On a very few occasions the ILC used a different form, and it has been encouraged by groups that have studied its work to try other forms. The draft convention is popular in part because it finesses the question of whether—at any given moment—the ILC is codifying the law or progressively developing it. Indeed, this practical benefit is so great that the ILC appears to find it difficult to adopt another working style. Moreover, the draft convention was the form employed for what would become the 1969 Vienna Convention on the Law of Treaties, which, in the culture of the ILC, is considered one of its particular successes. These themes were all explicit in recent ILC discussions, as can be seen as early as Crawford’s first report in 1998. Noting that the ILC usually prepared draft articles and deferred the question of form to the end of the process, Crawford continued:

Discussion of the eventual form of the draft articles is premature, at a time when their scope and content have not been finally determined. States unhappy with particular aspects of a text will tend to favour the non-conventional form, but the option of a declaration or a resolution should not detract attention from an unsatisfactory text. In other words, deferring consideration of the form of the instrument has the desirable effect of focusing attention on its content. The precedent of the Vienna Convention on the Law of Treaties is instructive. At one stage it was thought that the codification and progressive development of the law of treaties in the form of a treaty rather than a “restatement” was undesirable, and even logically excluded. Yet the Vienna Convention is one of the Commission’s most important products, and it seems likely that it has had a more lasting and a more beneficial effect as a multilateral treaty than it could have had, for example, as a resolution or a declaration.

As the ILC’s work on state responsibility approached its end in 2001, the question of form could no longer be deferred. But it is at the end that the illusion of the choice to defer or not to defer becomes apparent. At the anticipated end of a topic, theoretically the Commission could decide to undertake to rewrite the entire project as “model rules,” restatements

27 For example, the ILC work on rules of arbitral procedure was adopted as “Model Rules of Arbitral Procedure.” More recently, the ILC used the form of a commentary in addressing certain questions regarding reservations. Although there are some exceptions, I do not see a trend away from the dominant form. However, it is difficult to draw a strong conclusion. 


29 GOSWAMI, supra note 11, at 162 (noting that “the distinction … cannot be strictly maintained” and that the Commission “has, thus, generally considered that its drafts constitute both codification and progressive development of international law”); RAMCHARAN, supra note 11, at 104–05 (noting that “[w]here the Commission puts forward a draft convention …, it is possible to avoid distinguishing …”); Tomuschat, supra note 2, at 706 (noting that “it soon became apparent that a precise definition of the boundary between the two fields within the context of each and every project would be impossible ... The practice of separating the two procedures for every draft topic was therefore discontinued after only a few years.”); Robert Y. Jennings, Development of International Law and Its Codification, 1947 BRIT. Y.B. INT’L L. 301, 317. 

30 See, e.g., SINCLAIR, supra note 11, at 39. 

But, in reality, those choices are no longer available. Rather, the choice becomes whether to leave a study written as a draft convention to stand as is, or to refer it to a diplomatic lawmaking conference where it might be considered for adoption as a true treaty. On the latter choice, Crawford in his fourth and last report summarized the views of governments (expressed, for example, by the Nordic countries, Slovakia, and Spain) favoring the convening of a diplomatic conference to conclude a convention on state responsibility:

Those who favour this option note the stabilizing influence that the Vienna Convention on the Law of Treaties has had, and its strong continuing influence on customary international law, irrespective of whether particular States are parties to it. According to this view, the lengthy and careful work of the Commission on State responsibility merits being reflected in a lawmaking text. The traditional and established way in which this is done is by a treaty adopted either by a diplomatic conference or within the framework of the Sixth Committee.

Those governments (for example, Austria, China, Japan, the Netherlands, the United Kingdom, and the United States) that "doubted the wisdom of attempting to codify the general rules of State responsibility in treaty form," as summarized by Crawford,

note the need for flexibility and for a continued process of legal development, as well as the rather tentative and controversial character of aspects of the text. They doubt that States would see it in their interests to ratify an eventual treaty, rather than relying on particular aspects of it as the occasion arises. They note the destabilizing and even "decodifying" effect that an unsuccessful convention may have. In their view it is more realistic, and is likely to be more effective, to rely on international courts and tribunals, on State practice and doctrine to adopt and apply the rules in the text. These will have more influence on international law in the form of a declaration or other approved statement than they would have if included in an unratified and possibly controversial treaty.

These governments supported their position by citing the application of the draft articles by the International Court of Justice even before their adoption by the Commission, evidencing their possible influence over the long term.

Crawford's own view followed those arguing against the attempt to transform the articles into a treaty via a diplomatic lawmaking conference. Although he found that "the arguments are rather finely balanced" and that "the traditional mode of adoption of Commission texts has involved a diplomatic conference and a convention," his view was informed by the influence that the text had already had:

[U]nlike some other texts which have to be embodied in a convention if they are to have legal effect, there is no reason in principle why a declaration on State responsibility or some similar instrument could not become part of the droit acquis. . . . States, tribunals and scholars will refer to the text, whatever its status, because it will be an authoritative text in the field it covers. The draft articles have already been frequently cited and have had a strong formative effect even as drafts. This process of endorsement and application of individual provisions can be expected to continue, and will be enhanced by the adoption of the text by the General Assembly.

The ILC's discussion of form shortly thereafter in the summer of 2001 followed these same lines. Persons present at the meeting reported to the author that the particular question of form was intensely argued and narrowly decided. Indeed, the record of the debate states:

32 Franck & ElBaradei, supra note 28, at 638.
34 Id., para. 23.
35 Id., para. 25.
"Many members supported the conclusion of a convention, or the holding of a conference to conclude a convention."

To the ILC's credit, the debate is recorded quite frankly in its report to the General Assembly. And to me, there is a subtle dissonance as I read that summary. On the surface it reads like a rather classic discussion about the task entrusted to the ILC and how it might best fulfill its mission. Thus, it was said that the Commission's task is "to state the law, which could only be done through conventions; that the Commission had a tradition of having all of its major drafts adopted as international conventions." But below the surface swirls a much more complicated debate involving often fundamentally different estimations of the capacity of the traditional formal lawmaking processes.

Those favoring a treaty "pointed out that all States participating in a diplomatic conference would be involved in the treaty's elaboration on an equal footing." They argued that,

[to say that States would necessarily upset the balance of the text implied that they acted against their own interests, when in fact, States, in principle, acted responsibly and were capable of engaging in political negotiations to produce satisfactory results even in the framework of a general codification. Furthermore, codification conferences had tended to make few changes to consensus texts prepared by the Commission.]

Those opposed to a treaty were not nearly so sanguine: "the holding of a conference of plenipotentiaries would result in a lengthy process, unpredictable in outcome, and could call into question the balance of the text, laboriously achieved over 40 years." Moreover, the "possibility of reservations or of States adopting a non-cooperative stance posed further dangers."

Simultaneously weaving through this debate on the likely outcome of traditional lawmaking processes were estimations that the ILC's articles would have as much, if not more, influence if the attempt were not made to put them in a treaty form. "[A] convention was not strictly necessary since the draft articles adopted on second reading were bound to be influential, just as the existing text had been widely cited and relied on by the International Court and other tribunals." Furthermore, the fact that some of the articles involved the progressive development of international law rather than its codification did not appear to be problematic in this debate:

[O]n one view, the eventual form of the draft articles was dependent on their content: if a substantial lawmaking element was included, the appropriate form would be a multilateral convention, but if the draft articles merely codified existing rules, there would be no need for a convention. Others pointed out that precisely because the text contained elements of progressive development, caution was required and a convention should not be proposed. Practice showed that States were in general not in favour of such elements being included in internationally binding instruments.

The articles were forwarded to the General Assembly by the ILC after its 2001 session. The General Assembly followed the ILC's suggestion, and in its Resolution 56/83, adopted on
December 12, 2001, stated that it "takes note of the articles."\(^\text{44}\) The resolution then "commends" the articles to the attention of governments "without prejudice to the question of their future adoption or other appropriate action."\(^\text{45}\) Finally, the resolution indicates the Assembly's decision "to include in the provisional agenda of its fifty-ninth session [in 2004] an item entitled 'Responsibility of States for internationally wrongful acts'."\(^\text{45}\)

In one sense, the ILC's recommendation and the General Assembly's response should be absolutely startling. The ILC worked on this topic for at least forty years. The Sixth Committee of the General Assembly recently pressed the ILC to complete its work on the topic expeditiously. The ILC did so far faster and in a manner far more comprehensive than any could have anticipated. Yet the ILC's recommendation and the General Assembly's response were only to "take note" and delay all further consideration for three years.

That these results did not startle insiders (and from the conversations I have had, they did not) suggests that at least some of the articles remain controversial and would face a heavy test in a diplomatic conference. It also suggests that even if governments believe that the articles are important, their consideration today is not urgent. That sense is confirmed by the fact that relatively few governments offered comments on ILC drafts. Indeed, the ILA Study Group on State Responsibility noted this as a concern, counting only twenty-one governments that submitted comments and only a few that did so somewhat regularly.\(^\text{46}\) The ILC's recommendation and the General Assembly's resolution also suggest that some question the practical value of the diplomatic lawmaking conference's function. Is its deliberative process

\(^{44}\) Presumably, the phrase "takes note" means the General Assembly takes a position neither in agreement nor in opposition to the articles.

\(^{45}\) The resolution is brief and reads as follows:

"The General Assembly,

Having considered chapter IV of the report of the International Law Commission on the work of its fifty-third session, which contains the draft articles on responsibility of States for internationally wrongful acts,

Noting that the International Law Commission decided to recommend to the General Assembly that it take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution and annex the draft articles to that resolution, and that it should consider at a later stage, in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic,

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in the relations of States,

1. Welcomes the conclusion of the work of the International Law Commission on responsibility of States for internationally wrongful acts and its adoption of the draft articles and a detailed commentary on the subject;

2. Expresses its appreciation to the International Law Commission for its continuing contribution to the codification and progressive development of international law;

3. Takes note of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action;

4. Decides to include in the provisional agenda of its fifty-ninth session an item entitled "Responsibility of States for internationally wrongful acts".


Third, there is the problem of insufficient input by states into the work of the ILC. Comments by states are relatively few in number, are submitted more by a certain group of states than by other groups, and mostly address more basic issues than entering into specific details of the draft articles. In 1998, only sixteen states had commented. In 1999, the number increased only to 21 states.
too unpredictable? Are such conferences too expensive? Is the lengthy ratification process often involving indifferent states, and the confusing binding process often involving all manner of declarations, understandings, and reservations, a game not worth the candle? One government official familiar with all of these institutions stated to me that he personally has more confidence in the lawmaking integrity of the ILC than that of the Sixth Committee or a diplomatic conference.

The ILC's debate leading to its recommendation suggests that some of its members also feared that if the articles were subject to rewriting by the Sixth Committee or a diplomatic conference, they might actually lose effect because they would be altered in shortsighted and self-interested ways and that at all events any resultant treaty might not be widely subscribed to. But here, then, is an irony. Recall that the ILC chooses to present its work in treaty form because it finesses the day-to-day question of whether that work is codification or progressive development. And as Ian Sinclair points out in his study of the ILC, "A recommendation in favour of the conclusion of a convention is inevitably more appropriate when the Commission proposals embody significant elements of progressive development." The treaty form is thus a proposed piece of legislation; it looks like a law, it reads like a law, it might even be mistaken for a law, but it is not law. However, when the ILC articles, a study by experts written as though it were a treaty, are completed, the ILC recommends that they merely be taken note of because they have more potential for influence in that form.

All of these considerations evidence substantial uncertainty about the realities of traditional notions of international lawmaking. During the drafting of the UN Charter, the conference rejected a proposal by the Philippines that would have given the General Assembly legislative powers. As Christian Tomuschat writes, the consequence is that "the international treaty has retained its role as the central instrument in shaping international law." Hence, for work received from the ILC, the "General Assembly cannot carry out initiatives . . . by simply enacting a code . . . Unless it opts for a mere recommendation in [the] form of a resolution, it has to follow usual treaty-making procedure." What Tomuschat's incisive analysis does not mention is that when there is a "legal vacuum" of authority relevant to an issue, courts and arbitral panels will turn to whatever is available. In that situation, a set of articles adopted by the ILC will be quite influential, perhaps even more influential than a treaty.

In my view, it is entirely proper for the ILC to consider the endgame of its work product, and to take account of possible dysfunctions in the state system generally or relating to a particular topic. I am concerned, however, that the ILC's work, primarily because of its form, will have unwarranted influence. Members of the ILC might respond that its work will have only the influence it deserves. And, indeed, it may be that the usefulness of the articles will be tested in the real world. Some statements in the ILC record imply a more strategic belief that the articles will provide the grain of sand around which the pearl of international law will develop. However, that will occur only if states and other relevant actors conclude over time that they offer appropriate and workable solutions. Accordingly, the ILC articles should exercise such influence as they deserve. But the question of how much influence they deserve requires an appreciation of their authority and a method for applying and interpreting them. The next two sections of this essay address these two aspects of influence.

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47 Sinclair, supra note 11, at 47; accord Goswami, supra note 11, at 259.
48 For an overview of such international lawmaking options, see Paul C. Szasz, General Law-Making Processes, in 1 United Nations Legal Order 35 (Oscar Schachter & Christopher C. Joyner eds., 1995).
49 Tomuschat, supra note 2, at 706.
50 Id.
51 See Christian Tomuschat, International Law, in The United Nations at Age Fifty: A Legal Perspective 281, 296 (Christian Tomuschat ed., 1995) (stating that "academic skills must be matched by a vivid sense of political acceptability").
III. The Authority of the Work of the ILC

An ILC study, although written in the form of articles, is not a "source" of law. The ILC articles and commentary instead are evidence of a source of law. In the wording of Article 38(1) of the Statute of the International Court of Justice, the articles are a "subsidiary means for the determination of rules of law." That is, the work of the ILC is similar in authority to the writings of highly qualified publicists. This is the view of Clive Parry,52 and Ian Brownlie.53 One might conclude that the ILC should enjoy a particularly high standing among publicists given the representative array of experts who serve as members.54 A higher standing among publicists might also be justified inasmuch as its work is subjected to the review of the Sixth Committee and to periodic, thoughtful comment by states.55 Simultaneously, however, it must be recognized that considering the difficulty of generating a true collective opinion, the ILC might be more accurately viewed as a large commission (whose members vary in capability and commitment) that through painful compromise has yielded a lengthy advisory opinion.56 Similarly, the role of the Sixth Committee and commenting governments sometimes seems aimed more at eliminating certain controversial articles than at carefully appraising all the work. B. G. Ramcharan, essentially adopting the "highly qualified publicists" position, makes a natural and in my view correct extension of that status, concluding that some reports and some articles are better than others—a conclusion that fits well with the reality of the ILC.57 It may be that the practice of states can be found in their comments on drafts of the work of the ILC, but this aspect of the ILC's work does not alter the conclusion that it is not itself a source of international law.58

I emphasize this strict view of the significance of the articles because the ILC's choice to release its work on state responsibility in the form, but not the reality, of a treaty gives the study a greater aura of authority. The academic community, for example (and indeed this symposium), will add to this aura of authority in choosing to refer to the work of the ILC not as its "study on" or "restatement of" state responsibility but, rather, as the "ILC articles on state responsibility."

Recognizing that the ILC articles are not themselves a source of law is critical because, as I see it, arbitrators can otherwise defer too easily and uncritically to them. Several years ago, I studied the attribution practice of the Iran–United States Claims Tribunal, thinking that the Tribunal's decisions in the context of particular cases would allow me to evaluate the wisdom of the then draft ILC articles. To my surprise, I found that the Tribunal did not assess

54 Parry, supra note 52, at 114. See also as to a higher status, Mark E. Villiger, Customary International Law and Treaties 79 (1985).
55 See, e.g., Survey of International Law in Relation to the Work of Codification of the International Law Commission, UN Doc. A/CN.4/Rev.1, at 15-18 (1949), UN Sales No. 1948.V.1 ("Most probably their authority would be considerably higher.").
56 On the point of compromise, it is illuminating to review the early discussions as to whether members had the right to add dissenting opinions or reservations to the annual reports of the ILC, see Briggs, supra note 11, at 25-75.
57 Ramacharan, supra note 11, at 25.
Morton conducted a content empirical analysis of the ILC, concluding that "the political arena in which nation-states compete for the attainment of their vital interests has penetrated the International Law Commission to such an extent that commission debate is a microcosm of world politics. . . . A pristine, insulated chamber composed of independent legal experts simply does not exist." Morton, supra note 11, at 102-03. This conclusion could likely be reached about publicists generally and points to the care to be exercised generally when looking to the writings of publicists.
58 See Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 137 (1989) ("[T]he work of the ILC should not be regarded only as a manifestation of teachings of publicists. Additionally, it constitutes a stage in the UN work of codification and progressive development of international law and as such it may demonstrate practice of states and of international organizations." (emphasis added)).
Similar statements have been made regarding the authority of restatements of the American Law Institute in U.S. courts. See, e.g., Harold G. Maier, The Utilitarian Role of a Restatement of Conflicts in a Common Law System: How Much Judicial Deference Is Due to the Restaters or "Who are these guys, anyway?" 75 Ind. L.J. 541, 548 (2000) (stating that "no restatement is ever 'law.' It has no legal force. It is, in theory, an educated analysis . . . ").
the articles but, instead, tended to accept them as given: "Unfortunately, this point of criticism and potential challenge by the Tribunal did not explicitly come about, perhaps because the Tribunal agreed with the approaches taken by the Commission but also because the specific bilateral character of the Tribunal made it an unlikely institution to have a consistently innovative jurisprudence." 59

My investigation led to a significant insight into the dynamics of decision making, particularly in arbitral panels with party-appointed arbitrators, a tendency to defer to "neutral" external sources:

In a situation where the chairs of Chambers in the Tribunal often found themselves criticized, particularly by the Iranian arbitrators, for acting without regard for the law, it is understandable that such arbitrators would choose carefully when to develop the law progressively, i.e., be innovative and meet the challenge presented. Rather, one finds awards seeking to rest the legitimacy of the decision on the authority of the views of institutions other than the Tribunal. Thus it should not be surprising that, far from criticizing the Draft Articles of the Commission, the Tribunal cited and accepted those articles as authoritative. 60

An ad hoc arbitral panel not only involves party-appointed arbitrators, but also often involves persons who have not previously worked together. It takes time for such judges to develop collegiality and confidence in each other's impartiality and competence. Yet these are the qualities required for a panel to question the ILC text collectively, and to decide that the ILC's approach on a particular point, although perhaps attractive as a general matter, disregards crucial considerations in the case before it.

There is a double cost to paying too much deference in this way. The more obvious cost is the loss to legal development that results from the failure to articulate and test legal rules in the context of concrete cases. "In a strange, yet not wholly unpredictable way, the ILC draft stifled the elaboration of the law by the Tribunal." 61 But there is also a cost to the ILC's work itself. To the extent that tribunals simply defer to the ILC, it loses a valuable opportunity to receive feedback from legal experts who have to apply the ILC's rules in the crucible of the real world. 62 Thus, this deference inhibits the organic growth of the ILC's views.

IV. READING THE WORK OF THE ILC

In attempting to interpret and apply the ILC articles on state responsibility, it must be constantly borne in mind that they are not part of a treaty, and that it is inappropriate to approach them as if they were.

Several problems flow from the fact that the articles are expressed in the form of a treaty. The problems are subtle, yet potentially very significant.

Interpreting a Treatise Written as Though It Were a Treaty

First, there is the problem of false concreteness and false consensus. The treaty form lends an air of certainty and authority that belies the division of opinion on certain issues even within the ILC itself. The extent of this problem depends upon the article involved. To rectify the problem, one needs at a minimum to read the commentary and, more appropriately, to trace every step of the development of that article. Indeed, what is required is to analyze, perhaps even rewrite, the work of the ILC as though it were a narrative study.

60 Id. at 181–82 (footnote omitted).
61 Id. at 182 (footnote omitted).
The fact that the articles are not a treaty makes the preparatory documents all the more relevant. Preparatory documents are very difficult to use, and often not particularly conclusive, in interpreting an ambiguous treaty. Preparatory documents in the case of the articles on state responsibility, in contrast, are essential precisely because they reveal the ambiguity hidden in the often artificially concrete language of the articles. In the case of a treaty, the language is important because it represents the final choice of the negotiating parties who can create international obligations. In the case of a treatise written as though it were a treaty, the language of an article represents the dominant view of a large expert body that necessarily excludes minority views. In some arbitrations, the words of ILC draft articles have been parsed as though they were language within a treaty. This is a mistake. It is inappropriate to follow the admonition of the Vienna Convention on the Law of Treaties to look first to the ordinary meaning of the text as a directive to emphasize the content of a particular ILC article. In addition to the text of a particular article, a whole complex of additional meaning can be found in the commentaries and in decades of consideration by the ILC and the Sixth Committee. All of these elements make an important contribution to the total meaning of the ILC’s work but are lost through the mechanical application of a “plain meaning” rule. As with the writing of highly qualified publicists, the arbitrator seeking to refer to an ILC study should use whatever sources are available to understand the opinion offered by the ILC. Unfortunately, arbitrators and governments often do not have time to undertake the task of reconstructing what the work of the ILC would have looked like if it had been expressed as an opinion that pointed out areas of both agreement and uncertainty.

As an example, compare the wording of two articles adopted by the ILC in 1996 after years of discussion and the same articles as adopted for a second time in 2001 (table 1). The changes

<table>
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<tr>
<th>Articles 5 and 6 as Adopted in 1996</th>
<th>Articles 5 and 6 Adopted as Article 4 in 2001</th>
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<td><strong>Article 5</strong></td>
<td><strong>Article 4</strong></td>
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<tr>
<td><em>Attribution to the State of the</em></td>
<td><em>Conduct of organs of a State</em></td>
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<tr>
<td><em>conduct of its organs</em></td>
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<tr>
<td>For the purposes of the present</td>
<td>1. The conduct of any State organ shall be</td>
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<td>articles, conduct of any State</td>
<td>considered an act of that State under</td>
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<td>organ having that status under</td>
<td>international law, whether the organ</td>
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<tr>
<td>the internal law of that State</td>
<td>exercises legislative, executive,</td>
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<td>shall be considered as an act of</td>
<td>judicial or any other functions, whatever</td>
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<td>the State concerned under</td>
<td>position it holds in the organization of the</td>
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<tr>
<td>international law, provided that</td>
<td>State, and whatever its character as an</td>
</tr>
<tr>
<td>organ was acting in that capacity</td>
<td>organ of the central government or of a</td>
</tr>
<tr>
<td>in the case in question.</td>
<td>territorial unit of the State.</td>
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| **Article 6**                     |                                               |
| *Irrelevance of the position of*  |                                               |
| *the organ in the organization*   |                                               |
| *of the State*                    |                                               |
| The conduct of an organ of the    |                                               |
| State shall be considered as an    |                                               |
| act of that State under           |                                               |
| international law, whether that   |                                               |
| organ belongs to the constituent, |                                               |
| legislative, executive, judicial  |                                               |
| or other power, whether its       |                                               |
| functions are of an international |                                               |
| or an internal character, and     |                                               |
| whether it holds a superior or a  |                                               |
| subordinate position in the       |                                               |
| organization of the State.        |                                               |

[Placed within Article 4(1)]

in these texts seem small, but such changes are the subject of the lawyer’s life. Is it significant that the 1996 text refers to “organs having that status under the internal law of that State,” while the 2001 text states that an organ “includes any person or entity which has that status in accordance with the internal law of the State”? Does the word “includes” in the 2001 text imply that the definition of organ is not limited to that contained in Article 4(2)? Is it significant that the 1996 text asks whether the organ “belongs to the constituent, legislative, executive, judicial or other power,” while the 2001 text asks whether the organ “exercises legislative, executive, judicial or any other functions”? Do the words “power” and “functions” have the same scope? These examples may or may not be significant. It is significant to note, however, that Crawford in introducing the changes, and the ILC (which had an entirely different membership from that of the much earlier Ago period when this part of the 1996 text was first drafted) in considering these changes, viewed them as nonsubstantive drafting adjustments. If I were interpreting the 2001 articles as though they were the language of a treaty, the Vienna Convention on the Law of Treaties would direct me to focus on the ordinary meaning of the wording used. The fact that the ILC thought the changes in language were not substantive, however, demonstrates the questionableness of approaching the language of the text of an article as if that language carried the same presumption of care in wording as a treaty (even though that presumption of care may not be justified in fact regarding some treaties). Instead, one more properly would start with the original reports of the special rapporteurs and the ILC’s commentary, coming to the text of the article only last and only as an attempt of the ILC to summarize the preparatory documents and arrive at a concise consensus.

The Difficulty of Applying Abstractions

A second difficulty is that the representation of the secondary rules of state responsibility as “articles” requires a simplicity in their composition that masks both the complexity and the abstraction of the approach to state responsibility advanced by Ago.

The work of the ILC is always complex, and indeed can even be difficult for the Commission itself to unravel. In the 1980s, for example, the ILC worked on draft articles on the law of treaties between states and international organizations or between international organizations. This subject had been separated from the ILC’s earlier work on the law of treaties between states that had culminated so successfully in the 1969 Vienna Convention. The articles on the law of treaties involving international organizations were patterned on the articles on the law of treaties involving states. At its 1982 session, the Commission engaged in an extended discussion on how an article dealing with third states in the Vienna Convention should appear in the new project. To understand how it should be transferred, the ILC needed to understand what its earlier article meant. The ILC’s difficulty divining the meaning of its own earlier work is apparent in the record: “In reality, [the earlier articles] of the Vienna Convention had been formulated to cater for special treaties...Since the wording of those articles was general, it did not betray what the drafters had had in mind.”

Beyond complexity, there is an added level of abstraction in the state responsibility articles because they rest on Ago’s distinction between primary and secondary rules. The ILC effort on state responsibility initially addressed the substantive law regarding the protection of foreign investment and became bogged down in an ideological divide over the substance of the applicable standards. The thrust placed on the articles by Ago is said to represent an effort to avoid these substantive controversies by instead focusing on the secondary rules. Ago’s

distinction emphasizes what I have termed the trans-substantive rules, that is, a set of rules present in state responsibility independently of the particular substantive obligation in question. This abstraction is compounded by the fact that it is consciously removed from the real world of implementation where abstract rules are combined with, for example, evidentiary presumptions. In my experience, it can be quite complex to translate these articles to the real world of dispute resolution.

Tomuschat emphasizes this difficulty by contrasting the ILC’s work on state responsibility with its work on treaties. Asserting that the work on treaties “almost ideally combined aspects of legal theory with the needs of legal policy,” he finds the “academicism” of the work on state responsibility to present “an entirely different picture.”

An example of the severe difficulties in applying academic abstractions to concrete situations can be found in the recent decision on jurisdiction in an arbitration under Chapter 11 of the North American Free Trade Agreement (NAFTA) titled Loewen Group v. United States. In this case, the respondent argued that the jurisdictional reference in Article 1101(1) of the NAFTA to “measures adopted or maintained by a Party relating to... investors of another Party" did not include the types of judicial actions pointed to by the claimant as the basis for its claim. The respondent maintained that some judicial actions could constitute such a measure, but that most would not. The tribunal found that “an interpretation of 'measures' which extends to judicial acts conforms to the objectives of NAFTA as set out in Article 102(1).” The tribunal proceeded to state that “[s]uch an interpretation of the word 'measures' accords with the general principle of State responsibility. The principle applies to the acts of judicial as well as legislative and administrative organs. (See draft Article 4 on State Responsibility adopted by the International Law Commission...).”

What is the “general principle of State responsibility” to which the panel referred? It does not appear in Article 4, quoted above, which by that time began Chapter II, “Attribution of conduct to the State,” of the draft articles. Article 4 states in relevant part that “[t]he conduct of any State organ shall be considered an act of that State . . ., whether the organ exercises legislative, executive, judicial or any other functions.” On its face the draft article appears relevant and one can appreciate why the tribunal would refer to it. But one must step further into the abstract structure of the articles.

The most “general principle of State responsibility” in the draft articles is that contained in Articles 1 and 2. Those articles provide that a state (1) is internationally responsible for

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60 Caron, supra note 59, at 110.
61 Crawford, First Report, supra note 31. According to Crawford:

14. The distinction between primary and secondary rules has had its critics. It has been said, for example, that the “secondary” rules are mere abstractions, of no practical use; that the assumption of generally applicable secondary rules overlooks the possibility that particular substantive rules, or substantive rules within a particular field of international law, may generate their own specific secondary rules, and that the draft articles themselves fail to apply the distinction consistently, thereby demonstrating its artificiality.

15. On the other hand, to abandon the distinction, at the current stage of the work on the topic, and to search for some different principle of organization for the draft articles, would be extremely difficult. It would amount to going back to the drawing board, producing substantial further delays in the work. Moreover, it is far from clear what other principle of organization might be adopted, once the approach of selecting particular substantive areas for codification (such as injury to aliens) has been abandoned.

62 Tomuschat, supra note 2, at 711.
63 Loewen Group v. United States, Competence and Jurisdiction, ICSID Case No. ARB(AF)/98/3 (Jan. 5, 2001) (Anthony Mason (Pres.), L. Yves Fortier, & Abner J. Mikva, arbs.), available at <http://www.naftaclaims.com>. The author provided an expert opinion to the respondent in the proceeding. This aspect of the decision is not recounted in order to question the decision but, rather, to use one aspect of a complex question to demonstrate the difficulty in applying an abstract document such as the draft articles.
65 Loewen, supra note 69, para. 46.
66 Id., para. 47.
an internationally wrongful act, and (2) an internationally wrongful act requires conduct (a) attributable to the state and (b) constituting a breach of an international obligation. In other words, Article 4 provides only one element of an internationally wrongful act, that is, it makes clear that a judicial act is attributable to the state. Indeed, the respondent in its brief, citing draft Article 4, had acknowledged that judicial acts are acts of the state. But if there were no international obligations applicable to the state for the conduct of its judiciary, then there never would be state responsibility for judicial acts. The respondent's argument in Loewen was that very few obligations are placed on states for the acts of judicial bodies and those obligations all seem to reflect a loss, or violation, of the unique rule-of-law character of judicial bodies. Accordingly, the state parties to the NAFTA intended the word “measures” to include only a very limited set of judicial acts. The tribunal disagreed.

I recount this case not to disagree with the tribunal's conclusion but, rather, to point out the difficulty in applying the abstract articles to a concrete situation. The Loewen tribunal, for example, concluded that "[t]he principle that a State is responsible for the decisions of its municipal courts (or at least its highest court) supports the wider interpretation of the expression ‘measure adopted or maintained by a Party’ rather than the restricted interpretation advanced by the Respondent." But, as already indicated, Article 4 does not provide that a state is responsible for decisions of its municipal courts. It says only that such decisions are acts of the state—whether there is an international obligation potentially breached by such acts is a totally different question, which the draft articles do not touch on at all.

The Danger of Seeking to Understand Innovation Through the Lens of Codification

The ILC articles represent (at best) a restatement of the customary international law of the secondary principles of state responsibility. As with all custom, the approach of the articles may be derogated from by treaty. Indeed, as expressly recognized in Article 55, the articles do not exclude lex specialis. Article 55 provides: "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law." This deceptively simple concept, however, is difficult to apply in practice. For example, in the Loewen decision just described, although the primary issue there was the proper interpretation of the phrase "measure adopted or maintained by a Party," a critical secondary question was whether the state parties believed this phrase reflected customary law or instead formed a special regime of responsibility. In the latter case, the task of an arbitral panel would be doubly difficult because the panel would need to be careful not to frustrate the state parties by forcing their diplomatic innovations into boxes created by the codification of earlier state practice.

In sum, I urge that arbitrators take care not to give the articles undue or unquestioned authority. Further, arbitrators need to appreciate that these abstract rules are devilishly difficult to apply. Most of all, I urge that arbitrators, in seeking to understand the lex specialis before them, take particular care not to undo the intent and possible innovation of the parties. By too great and casual a deference to the lex generalis of the ILC draft articles, arbitrators may unconsciously undo the lex specialis of the parties.

V. Conclusion

The articles will have great effect, and that is a significant achievement. But they should have effect because of their integrity and value, not because they emerged from the ILC in

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73 Id., para. 54.
74 Draft Articles, supra note 3, Art. 55.
a form that looks like a treaty. The ILC's work on state responsibility will best serve the needs of the international community only if it is weighed, interpreted, and applied with much care. Indeed, I believe the ILC itself would say it hopes for such real-world testing of its work.

These articles represent the end of a long process. The ILC's work on state responsibility took turns, some controversial, some confusing. The articles are a mix of codification and progressive development; to be frank, it would often be difficult to say which article partakes more of one or the other. The articles were written in the form of a treaty, although many members of the Commission have doubts that there should be an intergovernmental attempt to conclude such a treaty. The articles have already affected legal discourse, arbitral decisions, and perhaps also state practice. Now that they have been adopted by the ILC, they are likely to have even greater impact. To apply them correctly, decision makers must avoid a simple reading of the articles but, instead, must consult the commentaries and reports for each article, which illuminate the practice underlying the rule, the discussions of the ILC, and the comments of various governments. Together these sources bring life to the articles and reveal the degree of consensus.

The articles should be welcomed, but simultaneously international law must be able to evolve with the needs of the international community. The articles partly protect the ability of the community to evolve by recognizing that the community itself or particular parties by their agreement may depart from the rules. This flexibility will be bolstered to the extent that arbitral tribunals assess whether a particular article has not been accepted in practice by states and thus partakes more of progressive development, and whether state practice responding to new needs has generated new rules on a particular question.

The ILC articles are intended to codify and progressively develop the law regarding the responsibility of states for internationally wrongful acts. They should not become a barrier to the future adaptation of that same law to the changing circumstances the international community will no doubt confront.