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Book Review of The Law of International Responsibility (James Crawford, Alain Pellet, and Simon Olleson eds., Oxford University Press, 2010)

Sean D. Murphy

George Washington University Law School, smurphy@law.gwu.edu

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The Law of International Responsibility. Edited by James Crawford, Alain Pellet, and Simon Olleson. Oxford, New York: Oxford University Press, 2010. Pp. lxxv, 1296. Index. \$495.

If one were to affix a label to the first decade of work by the UN International Law Commission (Commission) in this century, a good one to choose would be the “decade of codifying international responsibility.” No fewer than five projects relating to that general topic were brought to a conclusion by the Commission in the space of ten years, constituting a formidable effort at codification that may well influence the field of public international law for years to come. Given that the Commission had spent decades considering, as part of a single project, myriad aspects of state responsibility, in some respects these five projects may be seen as the product of a “divide and conquer” approach. Rather than a single instrument, the Commission produced five instruments directed at different slices of the field, with considerable variations among them in breadth, form, and the understanding of whether they reflect settled law.

In 2001, the principal project on the responsibility of states for internationally wrongful acts¹ was steered adroitly to its conclusion under the steady hand of James Crawford, a member of the Commission from 1992 to 2001 and the Whewell Professor of International Law at Cambridge University. Core areas of these articles addressed the attribution of conduct to a state, circumstances that preclude the wrongfulness of state action, consequences arising from a wrongful act (including reparation), and obligations/rights existing for the breaching/injured states (including the use of countermeasures to induce compliance), as well as the implications of the wrongful conduct for third states. As is customary, the Commission adopted useful commentary in conjunction with the articles, setting forth the basis for the rules in the practice of states and in the jurisprudence of courts and tribunals.

Simultaneous with the conclusion of those articles, the Commission adopted a set of draft articles concerning a state’s responsibility with respect to hazardous activities that are not, as such, prohibited under international law (such as the operation of an oil rig on the continental shelf), but that nevertheless may have led to adverse consequences for another state. This set of rules, also adopted in 2001, focused on the prevention of transboundary harm from such hazardous activities, obliging states to take measures to prevent or at least reduce the likelihood of damage.² Among other duties, the state must conduct a risk assessment of a proposed activity and, when a risk of significant transboundary damage exists, the state must notify the authorities of the potentially affected state.

¹ Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. INT’L L. COMM’N 26, UN Doc. A/CN.4/SER.A/2001/Add. 1 (Part 2) [hereinafter 2001 Draft Articles on State Responsibility].

² Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 370, UN Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. INT’L L. COMM’N 144, 157 (2001).

Continuing with the theme of rules regarding a state's responsibility for certain activities that are not prohibited under international law, in 2006 the Commission completed a set of draft principles on the allocation of loss in the event that a hazardous activity leads to transboundary harm.³ Here the interesting development was the abandonment of an initial approach that would have characterized the state itself as liable for significant harm, even when such harm could not have been prevented through the state's exercise of due diligence. Due to resistance by states to that concept, the 2006 principles instead encourage states within their national laws to impose liability on operators of hazardous activities when transboundary damage occurs and to allow nondiscriminatory access to national remedies for those harmed abroad. Notably, the final project took the form of "principles" rather than "articles," laced in many places with terms such as *should* rather than *shall*, apparently in recognition that the goal of complete harmonization of national laws was not achievable and that acceptance by states was more likely if the norms were largely cast as recommendations rather than as hard law.⁴

The Commission's 2006 session also finalized draft articles on "diplomatic protection," meaning the procedures to be used by a state when one of its nationals is injured by another state in contravention of international law.⁵ These draft articles confirmed that the right of diplomatic protection vests in the state of the injured person's nationality, including in the state of predominant nationality if the person is a dual national and the injury is attributable to the state of the second nationality. Various important elements when advancing a claim are addressed in these draft articles, including the rule requiring continuous nationality, the rule on exhaustion of local remedies, and the effects of the state's waiver of the claim.⁶

Finally, in 2011, the Commission adopted a set of draft articles on the responsibility of

³ Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities: General Commentary, *in* Report of the International Law Commission on the Work of Its Fifty-Eighth Session, UN GAOR, 61st Sess., Supp. No. 10, at 106, UN Doc. A/61/10 (2006).

⁴ *See* Report of the International Law Commission on the Work of Its Fifty-Sixth Session, UN GAOR, 59th Sess., Supp. No. 10, at 160, UN Doc. A/59/10 (2004).

⁵ Draft Articles on Diplomatic Protection, *in* Report of the International Law Commission on the Work of Its Fifty-Eighth Session, UN GAOR, 61st Sess., Supp. No. 10, at 16, UN Doc. A/61/10 (2006).

⁶ A further Commission project completed in 2006 concerned not the responsibility of states for breach of an international obligation but, rather, the way in which that obligation may be formed through a unilateral declaration of a state. *See* Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, Report of the International Law Commission on the Work of Its Fifty-Eighth Session, UN GAOR, 61st Sess., Supp. No. 10, at 367, UN Doc. A/61/10 (2006).

international organizations.⁷ Article 57 of the 2001 draft articles on state responsibility had excluded from the scope of those articles issues on the responsibility of states for acts of an international organization. Such “secondary” responsibility of states, as well as the responsibility of the organizations themselves, formed the subject of the Commission’s 2011 draft articles. In many respects, these draft articles replicated *mutatis mutandis* the 2001 draft articles, following a similar structure and content. The lack of comparable practice and jurisprudence relating to international organizations in support of many of the Commission’s propositions, however, resulted in a statement by the Commission at the outset of its commentary that the “fact that several of the present draft articles are based on limited practice moves the border between codification and progressive development in the direction of the latter.”⁸

To date, none of the draft articles or principles has been transformed into a treaty; in that sense, they remain “drafts” that states might use to develop a treaty regime, though at present the prospects for states doing so are low. The Commission’s approach in sending these projects to the UN General Assembly has not been to urge the adoption of new conventions; rather, it has typically recommended that the General Assembly take note of the instrument, with the possibility at some future point of transforming “draft articles” into “conventions.” Consequently, the General Assembly has noted the instrument and, in some circumstances, commended it to the attention of governments without prejudice to the question of its future adoption as a treaty.⁹ Hence, the instruments are available for scrutiny, use, and rejection by states, international organizations, courts, tribunals, and others, with some instruments likely garnering more support as codification of *lex lata*, due to their content, form, and character, and others seen more in the nature of *lex ferenda*.

As a means of making the 2001 draft articles on state responsibility readily available to and understood by the general public, in 2002 Crawford published a volume containing the articles, the associated commentary, a very useful introduction, index, table of cases, and select bibliography, and a guide to the “legislative history” of the articles, meaning a guide to the various reports of the Commission dating back to 1950s from which the articles emerged.¹⁰ He also published parallel versions of the volume in French in 2003¹¹ and Spanish in 2004.¹²

⁷ Draft Articles on the Responsibility of International Organizations, *in* Report of the International Law Commission on the Work of Its Sixty-Third Session, UN GAOR, 66th Sess., Supp. 10, at 54, UN Doc. A/66/10 (2011).

⁸ *Id.* at 70.

⁹ *See, e.g.*, GA Res. 56/83, para. 3 (Dec. 12, 2001); GA Res. 59/35, para. 1 (Dec. 2, 2004) (taking note of and commending to the attention of governments the 2001 Draft Articles on State Responsibility); *see also* James Crawford & Simon Olleson, *The Continuing Debate on a UN Convention on State Responsibility*, 54 INT’L & COMP. L.Q. 959 (2005).

¹⁰ JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* (2002).

¹¹ JAMES CRAWFORD, *LES ARTICLES DE LA C.D.I. SUR LA RESPONSABILITÉ DE L’ÉTAT:*

The book under review here, edited by Crawford, Alain Pellet, and Simon Olleson,¹³ is yet a further effort to help illuminate the law in this area, this time through expert commentary by academics and practitioners. Though the commentary exceeds 1,200 pages, the essays are not lengthy pieces probing a limited range of issues in great depth; rather, the book consists of almost one hundred essays averaging about 12 pages each, exploring a very wide range of issues with insightful and pointed analyses. The principal focus is on the rules contained the 2001 draft articles on state responsibility, but the scope of this volume is broader, covering the other projects noted above to a greater or lesser degree.¹³ Moreover, the book pays some attention to the international responsibility of entities other than states and international organizations, such as private individuals, armed bands, criminal groups, and nongovernmental organizations. As such, the volume lives up to its title, attempting to map the different slices of international responsibility noted above onto one another, in a single conceptual framework.

The book is divided into five parts. Part I addresses the concept and system of international responsibility in international law, featuring essays by Pellet, Crawford, and Eric David. Part II considers the mechanics of developing the law in this area, including efforts at codification and the means by which the international law of responsibility operates in both the international and national legal systems. Part III turns to the sources of the law of international responsibility, essentially focusing on the issues of attribution, breach, and circumstances precluding wrongfulness that were addressed in the first part of the 2001 draft articles on state responsibility, as well as exploring sources in the absence of an internationally wrongful act.

Part IV reviews the content of law of international responsibility: obligations that arise when a breach occurs, modalities of reparation, and consequences flowing from violation of an *erga omnes* obligation (issues that characterized the second part of the 2001 draft articles on state responsibility). In an effort to connect such secondary rules to different sets of “primary rules,” part IV also probes the operation of the rules on responsibility in specific regimes, including human rights, trade, environment, and investment. The content of the law of international responsibility is also explored in the context of the absence of an internationally wrongful act,

INTRODUCTION, TEXTE ET COMMENTAIRES (2003).

¹² JAMES CRAWFORD, *LOS ARTÍCULOS DE LA COMISIÓN DE DERECHO INTERNACIONAL SOBRE LA RESPONSABILIDAD INTERNACIONAL DEL ESTADO: INTRODUCCIÓN, TEXTO Y COMENTARIOS* (2004).

¹³ A professor at Université de Paris Ouest-Nanterre La Défense, Pellet was a member of the Commission throughout the period described above, only leaving its service in 2011. Olleson served as an assistant to Crawford in the summer of 2001 during the Commission’s final consideration and adoption of the 2001 draft articles on state responsibility, and at present is a barrister with Thirteen Old Square in London.

¹³ Because the volume was published in 2010 prior to the final adoption of the articles on the responsibility of international organizations, it focuses on the Commission’s draft articles adopted on first reading in 2009, not the final version produced in 2011.

with essays on the “polluter pays” principle, maritime law, space law, and nuclear energy.

Part V addresses the implementation of the law of international responsibility, an area correlating to the third part of the 2001 draft articles on state responsibility, with a focus on the rights of the injured party (be it a state, an international organization, or some other entity), the process for bringing claims, and the availability of countermeasures to induce compliance. Four appendices provide some of the texts of the International Law Commission, but the real value comes from an excellent table of cases and statutes, as well as a useful listing of all the reports by the Commission on these matters.

One cannot help but applaud the prodigious effort to integrate the law in this area and embellish upon it through copious commentary. Anyone interested in understanding, for example, the circumstances precluding wrongfulness of a state should begin an inquiry with the 2001 draft articles on state responsibility, supplemented by the Commission’s associated commentary. But the next stop should be this volume, to see the short but useful commentary on consent (by Affef Ben Mansour), compliance with peremptory norms (Maja Ménard), self-defense (Jean-Marc Thouvenin), countermeasures (Hubert Lesaffre), *force majeure* and distress (Sandra Szurek), and necessity (Sarah Heathcote). Similarly, the forms of reparation are recounted in the 2001 articles on state responsibility and explained in the associated commentary, but this volume contains excellent further analyses on restitution (Christine Gray), compensation (John Barker), interest (Sir Elihu Lauterpacht and Penelope Nevill), and satisfaction (Eric Wyler and Alain Papaux). Such analyses probe somewhat deeper into the origins of the relevant rule but also assess the application of the rule by courts and tribunals in the years following completion of the Commission’s work.

Despite its many strengths, the book has some shortcomings. Starting with the design of the project, about two-thirds of this book was originally written in French (p. vi), so in many places the language construction and terminology in English are unusual. A minor example is the use of the term *double nationality* (pp. 89, 844), rather than the more common *dual nationality*, though the former is the literal translation of the common French term *double nationalité*. More seriously, some precision in legal analysis may have been lost in translation, such as the assertion that the Iran-U.S. Claims Tribunal’s inter-state jurisdiction covers “commercial” claims (p. 843), when it should more narrowly be stated as covering “contractual arrangements” for the sale of goods and services (hence excluding claims concerning expropriation or any other non-contractual measure).¹⁴ On balance, though, any defects of this kind are more than compensated by providing access for anglophone readers to francophone views.¹⁵

¹⁴ Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, Art. II(2), *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 3 (1983).

¹⁵ Those able to do so may wish to refer to the French version of the book published by Pedone in 2010.

While the contributors to this volume vary from eminent scholars to budding doctoral students, the range geographically is much more limited, with fewer than ten of the almost one hundred contributors based outside of Europe, and those few principally in Australia and Japan, or at the United Nations.¹⁶ Nothing is inherently wrong with a volume of this magnitude being Eurocentric, but it likely would have been strengthened by including a broader range of views from scholars and practitioners across the globe, particularly those able to address concepts of responsibility as they are emerging in regional and subregional contexts.

Turning more directly to substance, an important element not squarely addressed here is the reaction of governments to the various instruments issued by the Commission, in their written comments to the Commission, in their statements before the Sixth Committee of the General Assembly in New York, and in other fora. The degree to which these rules are viewed as authoritatively capturing contemporary international law turns, in part, on their acceptance by states, such that what governments say about specific articles or principles in the course of their adoption and thereafter is quite important. For example, the debates in the Sixth Committee on the 2001 draft articles on state responsibility revealed significant disagreement about the regime of responsibility associated with *jus cogens* violations (Articles 40–41), about the invocation of responsibility by noninjured states (Article 48), and about the treatment of countermeasures (Articles 49–54). A table in this volume capturing those reactions would have been of great value, in addition to an essay analyzing the weight to be given such reactions when considering whether the Commission’s formulations reflect established law.

Within weeks after the completion of the 2001 draft articles on state responsibility, Al Qaeda orchestrated an attack upon the United States by means of hijacked aircraft that resulted in the death of more than 3,000 people, mostly civilians. A question that immediately arose concerned whether Afghanistan, under the de facto control of a largely unrecognized government (the Taliban), could be viewed as internationally responsible for the attacks, having hosted Al Qaeda camps for many years, notwithstanding international demands that the camps be closed and that senior leaders, including Osama bin Laden, be handed over for trial. The 2001 articles provided no real guidance on these points, for none of the articles on attribution of conduct to states directly addressed the situation. Could the attack be attributed to the state of Afghanistan? When attributing conduct, does it matter if the de facto government is not recognized? Did the United States have to establish first that the Taliban was either unwilling or unable to move against Al Qaeda before an internationally wrongful act by Afghanistan could be said to exist, justifying a U.S.-led invasion? Or was the U.S. action in self-defense only against Al Qaeda and an unrecognized entity, such that issues of state responsibility did not arise? If the United States identified Al Qaeda operatives in other countries, under what circumstances might the United States deem those countries responsible for hosting such operatives?

While the 2001 articles did not answer such questions, the volume under review here might have sought to do so, particularly as it includes essays on attribution of conduct by private individuals to the state and on the direct responsibility of private individuals, armed bands, and criminal groups. Yet those essays eschew any detailed discussion of the implications of the 9/11

¹⁶ None of the contributors appears to be native to the Americas.

attacks or any other comparable terrorist attack, leaving things just as muddled as they were in 2001–02.

The quality of the essays is not uniform, a situation perhaps unavoidable in a project of this scale and breadth. Returning again to the Iran-U.S. Claims Tribunal, the following assertion is wrong or at least very misleading: “Despite the jurisdiction of the Tribunal over the interpretation and execution of the Algiers Declarations, which covers inter-State responsibility, only one award has expressly established the responsibility of the United States of America for violation of its obligations towards Iran,” citing to Case A/27 (p. 844).¹⁷ There are, in fact, several decisions under this “interpretive” jurisdiction (the “A claims”) where the Tribunal has established the responsibility of the United States to Iran, notably in Case A/15, pt. I:C,¹⁸ Case A/15, pts. II:A and II:B,¹⁹ and Case A/15, pt. I:G,²⁰ the latter of which resulted in the payment to Iran of some \$500 million.²¹ Overall, about twenty of the “A claims” have resulted in an award or decision by the Tribunal.²² Moreover, as noted above, the Tribunal also has jurisdiction to decide contract disputes between the two states (the “B claims”), which is also relevant to the issue of inter-state responsibility, including issues of attribution, circumstances precluding wrongfulness, forms of reparation, and countermeasures. Seventy-seven “B claims” were filed by the two states (two-thirds by Iran), and seventy-two of those claims have led to an award or decision.²³ Both Iran²⁴ and the United States²⁵ have been found in violation of their obligations,

¹⁷ In Case A/27, the Tribunal found that the United States violated the Algiers Accords by failing to enforce in U.S. courts a Tribunal award in favor of Iran against a U.S. national. The Tribunal ordered the United States to pay approximately five million dollars in compensation.

¹⁸ *Iran v. United States* (Case A/15, pt. I:C), 25 Iran-U.S. Cl. Trib. Rep. 247 (1990 II).

¹⁹ *Iran v. United States* (Case A/15, pts. II:A, II:B), 28 Iran-U.S. Cl. Trib. Rep. 112 (1992).

²⁰ *Iran v. United States* (Case A/15, pt. I:G), 12 Iran-U.S. Cl. Trib. Rep. 40 (1986 III).

²¹ See GEORGE H. ALDRICH, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL: AN ANALYSIS OF THE DECISIONS OF THE TRIBUNAL* 497 (1996).

²² Jeremy K. Sharpe, *Iran-United States Claims Tribunal*, in *THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS* 545, 554 (Chiara Giorgetti ed., 2012).

²³ *Id.* at 553–54.

²⁴ For example, in 1996 the Tribunal issued an award in Case B/36 concerning a U.S. claim for amounts due from Iran under a World War II military surplus property sales agreement. The Tribunal found Iran liable for breach of the agreement and ordered Iran to pay the United States more than \$21 million in principal and interest. *United States v. Iran*, 32 Iran-U.S. Cl. Trib. Rep. 162 (1996); *United States v. Iran*, 33 Iran-U.S. Cl. Trib. Rep. 56, 346 (1997).

²⁵ For example, in 1984 the Tribunal issued an award in Case B/7 concerning an Iranian claim for reimbursement of advance payments that had been made by the Atomic Energy Organization

leading to the payment of compensation. Indeed, the principal remaining claims at the Tribunal, especially Case B/1 (concerning the U.S. foreign military sales program with Iran prior to the latter's 1979 revolution), fall under this category of claims and will likely keep the Tribunal occupied for years to come.

Despite these points, *The Law of International Responsibility* is an exceptional resource. Designed to embrace numerous recent initiatives by the Commission in the field of international responsibility, the volume as a whole provides a variety of useful and important essays, which are carefully organized and thoughtfully executed by a very talented group of individuals.

SEAN D. MURPHY
George Washington University

of Iran to the U.S. government pursuant to two uranium enrichment services contracts. The Tribunal found the United States liable and ordered it to pay nearly \$8 million to Iran, plus interest. *Iran v. United States*, 6 Iran-U.S. Cl. Trib. Rep. 141 (1984 II); *Iran v. United States*, 12 Iran-U.S. Cl. Trib. Rep. 25 (1986 III). In Case B/1 (Claim 4), the Tribunal found the United States liable to pay compensation for certain Iranian military properties that the United States refused to transfer to Iran after the Iranian revolution, *Iran v. United States*, 19 Iran-U.S. Cl. Trib. Rep. 273 (1988 II), leading to a settlement in which the United States paid Iran \$278 million. *Iran v. United States*, 27 Iran-U.S. Cl. Trib. Rep. 282 (1991 II).