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The Heritage of the Articles on State Responsibility for the International Law Commission

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The Heritage of the Articles on State Responsibility for the International Law Commission

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In the two decades since their adoption in 2001, the International Law Commission (ILC)'s Articles on the Responsibility of States for Internationally Wrongful Acts (ASR) have had an extraordinary influence, not just on the field of international law generally, but also on the work of the ILC itself.[1] Indeed, the ILC concluded four projects that directly resulted from or were closely related to the ASR in the first decade after its adoption. Moreover, references to the ASR have worked their way into most (albeit not all) of the ILC topics completed since 2001.

Yet those express references tell just part of the story. Given the fundamental role of the issues addressed in the ASR across all fields of international law, it is natural for ILC members to consult habitually the ASR when drafting or revising texts and when developing the associated commentary. Even if not expressly referenced in the completed work of the ILC, the ASR are often noted in reports of the special rapporteurs, debates in the ILC plenary, and in the ILC's drafting committee, not just for the broad propositions of law addressed in the ASR, but also for the particular words used by the ASR and their commentary when capturing legal concepts. As such, in the two decades since their adoption, the ASR have strongly influenced the ILC's work on all of its topics. And, in all likelihood, such effects will continue into the future.

Part I explains the four projects completed from 2001 to 2011 that directly resulted from or were closely related to the ASR. Part II demonstrates the ASR's influence on a number of other topics completed by the Commission over the past two decades. Part III concludes with reflections on why the ASR have left such an extensive heritage in the work of the ILC, and why such influence will likely continue in the future.

1. Influence on Topics Directly Resulting from or Closely Related to the ASR

In 2001, the ILC completed its work on the ASR under the steady hand of James Crawford, a member of the Commission from 1992 to 2001. As discussed throughout this volume, core areas of these articles addressed the attribution of conduct to a state, circumstances

[1] Articles on Responsibility of States for Internationally Wrongful Acts, in ILC, 'Report of the International Law Commission on the Work of Its 53rd Session' (23 April–1 June and 2 July–19 August 2001) UN Doc A/56/10, 26–30 (hereafter ASR). Citations throughout this chapter are to the ILC's annual reports, which are readily accessible on the ILC's website, but for the more definitive text, reference should be made to the ILC *Yearbook*.

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 its practice, 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.

The ASR have had an important influence in their own right on states, international organizations, international courts and tribunals, and others. Yet their heritage within the work of the ILC is especially strong. Indeed, four projects were completed by the ILC from 2001 to 2011 that directly resulted from or were closely related to the ASR. In some respects, these other projects may be seen as the consequence of a 'divide and conquer' approach. Rather than a single instrument, the Commission produced five instruments (the ASR and the four projects indicated below) directed at different slices of the field of responsibility, with considerable variations among them in breadth, form, and the understanding of whether they reflect settled law.

a) Prevention of Transboundary Harm from Hazardous Activities

When commencing its work on what became the ASR, the Commission in the 1950s contemplated addressing both the responsibility of states arising from unlawful acts *and* the responsibility of states arising from lawful acts.[2] The Commission wished not to prejudge the possibility of the latter form of responsibility and thus viewed it as desirable to work on both forms of responsibility, starting with unlawful acts and at some point separately addressing lawful acts.[3] Yet work on the latter form did not commence until the 1970s, with the formal adoption in 1978 of the topic 'international liability for injurious consequences arising out of acts not prohibited by international law'. A working group was established, and then a special rapporteur was appointed to shepherd the topic (Robert Quentin-Baxter, followed by Julio Barboza). Like the ASR, however, work on this topic was slow and difficult. In 1992, it was decided that the scope of the topic should focus on two issues (prevention and remedial measures), and eventually the topic was split into two new topics: 'prevention of transboundary harm from hazardous activities' and 'international liability in case of loss from transboundary harm arising out of hazardous activities'. Work then proceeded on the first topic (with Pemmaraju Sreenivasa Rao as special rapporteur) and, once that was completed, work began on the second topic (discussed in the next section).

The first reading of the 'prevention' topic was completed in 1998 followed by a second

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[2] For the chronological unfolding of this topic, see Arnold Pronto and Michael Wood, *The International Law Commission 1999–2009* (OUP 2011) 359-64 (hereafter Pronto and Wood, *The International Law Commission*).

[3] ILC, 'Report of the International Law Commission on the Work of Its 25th Session' (7 May–13 July 1973) UN Doc A/9010/Rev.1, 169, paras. 38–39; ILC, 'Report of the International Law Commission on the Work of Its 29th Session' (9 May–29 July 1977) UN Doc A/32/10, 6, para. 17.

reading and adoption in 2001.[4] As such, the outcome of this topic—19 draft articles with commentary, with a recommendation that they form the basis for a convention—might not be viewed as part of the heritage of the ASR, which were themselves concluded in the same time frame. Moreover, this 'prevention' topic is very different in nature; it concerns principally steps that states should take in the period prior to any significant harm or damage occurring from authorized and regulated hazardous activities, recognizing that a state is responsible for the lawful exploitation of its resources if doing so causes damage to the environment of another state. 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.

Yet it is precisely in the contradistinction to the ASR that a heritage, of sorts, of the ASR may be discerned. The ILC's work on the 'prevention' articles was completed with an eye on the ASR; the rules and concepts of the ASR had to be considered, even if to set them aside when completing the 'prevention' articles. Ultimately, the ILC determined that the 'prevention' articles called for an entirely different set of rules from the ASR that focus on the *consequences* of a state's activity and not on the lawfulness of the activity itself. Thus, the activities at issue in the 'prevention' articles are 'lawful' not 'unlawful'; they concern 'liability' not 'responsibility'; they are almost entirely different in nature, content, and the forms of liability, which are tied to the existence of certain types of risk.[5] Indeed, while the ASR address secondary rules of international law that are activated once a breach of a primary rule occurs, the 'prevention' articles are concerned with primary rules; the non-fulfilment of the duty of prevention itself engages State responsibility, not some other primary rule of international law.

b) Allocation of Loss for Transboundary Harm Arising out of Hazardous Activities

Having addressed in 2001 the prevention of transboundary harm from hazardous activities, the Commission then turned to the allocation of loss in the event that a hazardous activity leads to transboundary harm, concluding with the adoption in 2006 of a series of principles.[6] Here an interesting development was the abandonment of an initial approach that would have characterized *the state* as liable for significant harm; instead, the principles 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. Further, 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

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[4] Articles on Prevention of Transboundary Harm from Hazardous Activities, in ILC, 'Report of the International Law Commission on the Work of Its 53rd Session' (23 April–1 June and 2 July–19 August 2001) UN Doc A/56/10, 146–48.

[5] Ibid, 150, para. (6) ('This approach has been adopted in order to separate the topic of international liability from the topic of State responsibility.').

[6] Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, in ILC, 'Report of the International Law Commission on the Work of Its 58th Session' (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10, paras. 58–60 (hereafter Principles). For background on this topic, see Pronto and Wood, *The International Law Commission* (n 2) 413–19.

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.[7]

As was the case with the 2001 'prevention' articles, these principles to a significant degree defined themselves by way of comparison to the ASR, such as when explaining the difference between 'responsibility' and 'liability'.[8] Yet these principles also drew upon the ASR in areas where they were pertinent. For example, the principles referred to ASR Article 31 when addressing the general obligation to make full reparation and when discussing pertinent aspects of the payment of compensation.[9] Moreover, while focused on the liability of private operators, the commentary make clear that the principles on allocation of loss were without prejudice to the rules set forth in ASR; if there were any wrongful acts by states, those rules would fully apply.[10]

c) Diplomatic Protection

When the Commission initiated its work on State responsibility, it was envisaged that the topic would deal in some depth with rules relating to a state's diplomatic protection of its nationals, meaning the rules that applied whenever a state pursued a claim on behalf of one of its nationals for a wrongful act of another state against that national.[11] In fact, the first ILC special rapporteur for State responsibility, Francisco García Amador, included a number of draft articles on the subject in the reports he presented from 1956 to 1961.[12] Yet thereafter, the work on what became the ASR essentially ignored rules specific to diplomatic protection. Though the ASR ultimately touched on related aspects—for example, much of the commentary to ASR Article 36 on compensation used as examples cases involving diplomatic protection—the ASR expressly stated that the issues of nationality of claims and of the exhaustion of local remedies would be dealt with more extensively in a separate topic.[13]

As it entered the final stages of completing the ASR, the Commission in 1997 turned back to a robust treatment of the rules on diplomatic protection, finalizing (under the leadership of special rapporteur John Dugard) a set of draft articles in 2006, the same year it completed the work on allocation of loss for transboundary harm arising out of hazardous activities. Among other things, these articles confirmed that the right of diplomatic protection vests in the state of

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[7] See ILC, 'Report of the International Law Commission on the Work of Its 56th Session' (3 May–4 June and 5 July–6 August 2004) UN Doc A/59/10, 68, paras. 13–14.
[8] Principles (n 6) 62, para. (5) (commentary to Principle 1).
[9] Ibid, 75–76, paras. (16) and (18) (commentary to Principle 3).
[10] Ibid, 60, para. (7) (general commentary).
[11] For background on this topic, see Pronto and Wood, *The International Law Commission* (n 2) 481-85; Alain Pellet, 'The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts' in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 75, 88–90 (hereafter Pellet, *ASR and Related Texts*).
[12] See Daniel Müller, 'The Work of García Amador on State Responsibility for Injury Caused to Aliens' in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 69.
[13] ASR (n 1) 121, para. (2) n 683, para. (5) n 687 (commentary to Article 44).

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, like the rule requiring continuous nationality, the rule on exhaustion of local remedies, and the effects of the state's waiver of the claim.[14]

Given that diplomatic protection is a topic nestled amongst many possible topics relating to State responsibility, with both topics involving secondary rules, it is no surprise that the ILC drew heavily upon the ASR when completing the diplomatic protection topic.[15] Indeed, many of the ASR rules serve as the relevant backdrop to the 2006 draft articles, thus alleviating any need to repeat the former in the latter. To the extent that a state is responsible for injuring a foreign national, the commentary to the 2006 articles recognized that the state is responsible to cease the wrongful conduct and to make full reparation for the injury in accordance with the rules contained in the ASR, principally at Articles 28, 30–31, and 34–37.[16] When contemplating what elements should be specified in a diplomatic claim on behalf of an injured national, the commentary to the 2006 articles referred to ASR Article 43 and its commentary.[17] In confidently asserting that the exhaustion of local remedies rule was a 'principle of general international law' supported by case law, state practice, treaties, and writings of publicists, the 2006 articles referred to both the first and second reading text and commentary of the ASR.[18] In fact, when considering the invocation of the responsibility of the state that wronged the foreign national, the commentary to the 2006 articles candidly noted that its 'article 1 deliberately follows the language of' the ASR, in particular drawing upon concepts arising from ASR Articles 42–48.[19]

Yet the articles on diplomatic protection also took the ASR to a deeper level of understanding. Thus, with respect to exhaustion of local remedies, the ASR in Article 44 did indicate that the responsibility of a state may not be invoked if 'the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted'. Yet the ASR did not elaborate on the details of the local remedies rule, leaving the matter to the diplomatic protection topic. Consequently, the commentary to Article 15 of the 2006 articles (on 'exceptions to local remedies rule') noted that ASR Article 44(b) required local remedies to be 'available and effective',[20] but then expanded upon this standard to require that 'there are no reasonably available local remedies' capable of 'provid[ing] effective redress' or

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[14] Articles on Diplomatic Protection, in ILC, 'Report of the International Law Commission on the Work of Its 58th Session' (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10, 24–25 (hereafter Articles on Diplomatic Protection). 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. This Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, in ILC, 'Report of the International Law Commission on the Work of Its 58th Session' (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10, 161.

[15] See Articles on Diplomatic Protection (n 14) 27, para. (2) (commentary to Article 1).

[16] Ibid, 26, para. (1) (general commentary).

[17] Ibid, 39, para. (4) n 111 (commentary to Article 10).

[18] Ibid, 44, para. (1) n 170–73 (commentary to Article 14, referring to both readings of the ASR).

[19] Ibid, 27, para. (6) n 30 (commentary to Article 1).

[20] Ibid, 47, para. (3) n 205 (commentary to Article 15).

that 'the local remedies provide no reasonable possibility of such redress'.[21] When pursuing such matters, the 2006 articles benefited from the earlier work of the special rapporteurs who, over the decades, labored in the fields of State responsibility. For example, the commentary to the 2006 draft articles referred to the positions of García Amador regarding which state may pursue diplomatic protection in the context of a dual national and on what would constitute an unreasonable delay in providing a local remedy.[22]

In reiterating the legal concepts and conclusions reached in the ASR, the 2006 articles began a process of stamping the ASR into the DNA of the ILC. A good example of this is the statement in the 2006 articles that, despite the view taken by the International Court of Justice in the 1966 *South West Africa* cases (to the effect that a state may not bring legal proceedings to protect the rights of non-nationals), that position now 'has to be qualified in light of' the ASR, specifically Article 48(1)(b), which acknowledged that certain obligations are owed to the international community as a whole.[23]

d) Responsibility of International Organizations

The fourth project that directly resulted from or is closely related to the ASR is the 2011 Articles on the Responsibility of International Organizations.[24] Article 57 of the ASR provided that the ASR were 'without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization'.[25] Such 'secondary' responsibility of states, as well as the responsibility of the organizations themselves, instead formed the subject of the 2011 articles.

The heritage of the ASR with respect to the 2011 articles is especially strong; in many respects, the 2011 articles replicated *mutatis mutandis* the ASR, following a similar structure and content. Had the ASR not been completed, it is not clear that the 2011 articles could have been possible, for there was far less practice to draw upon with respect to the responsibility of international organizations. Indeed, the lack of comparable practice and jurisprudence relating to international organizations in support of many of the Commission's propositions resulted in a statement by the Commission at the outset of its 2011 commentary that '[t]he 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'.[26]

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[21] Ibid, 25, Article 15(a).
[22] Ibid, 35, para. (3) (commentary to Article 7, regarding dual nationals); ibid, 48, para. (5) (commentary to Article 15, regarding unreasonable delay).
[23] Ibid, 51, para. (2) (commentary to Article 16).
[24] Articles on the Responsibility of International Organizations, in ILC, 'Report of the International Law Commission on the Work of Its 63rd Session' (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10, 54–68 (hereafter Articles on Responsibility of International Organizations). For background on this topic, see Pellet, *ASR and Related Texts* (n 11) 90–92.
[25] ASR (n 1) 30, art. 57.
[26] Articles on Responsibility for International Organizations (n 24) 70, para. (5) (general commentary).

A less apparent heritage may be, in the wake of the 2011 project, a transformation in the ILC's thinking about international organizations as actors in the field of international law that merit separate treatment from states. Until and including the 2011 articles, the ILC had habitually viewed the rules relating to states as distinct from the rules relating to international organizations, resulting in separate approaches in areas such as the law of treaties,[27] immunity,[28] representation,[29] status of diplomatic couriers and bags,[30] and responsibility. Though previously approaching topics as there being discrete (albeit largely parallel) rules operating in different domains for states and for international organizations, after 2011 the ILC essentially abandoned any such distinction, instead generating rule sets applicable to both actors. Thus, in the 2018 Conclusions on Identification of Customary International Law, there is no suggestion that the identification of rules of customary international law binding on international organizations is any different from those binding on states[31] To similar effect, the 2021 Guide to Provisional Application of Treaties announces that the 'guidelines concern the provisional application of treaties by States *or by international organizations*'.[32] Other ILC topics since have studiously avoided referring to 'states' as the object of the topic, so as to allow implicitly for the inclusion of international organizations.[33] This shift in approach may have various explanations: a fatigue at the ILC in replicating work; an ILC realization that the available practice of international organizations is much thinner than that of states, such that the rules for the former are strengthened by embedding them in the rules for the latter; an ILC wariness in continuing to develop projects focused on international organizations that states tend to reject; and/or emergence of an ideological orientation that seeks to build up the stature of international organizations by more closely aligning them with the stature of states.

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[27] Compare the 1969 Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, with the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (opened for signature 21 March 1986, not yet in force) UN Doc A/CONF.129/15.

[28] Compare the 2004 Convention the Jurisdictional Immunities of States and Their Property (opened for signature 2 December 2004, not yet in force) UN Doc A/RES/59/38, with the ILC's discontinued topic on Status, Privileges and Immunities of International Organizations, Their Officials, Experts, Etc. (worked on during 1976-1992).

[29] Compare the 1961 Vienna Conventions on Diplomatic Relations (opened for signature 18 April 1961, entered into force 24 April 1964) 500 UNTS 95, and the 1963 Vienna Convention on Consular Relations (opened for signature 24 April 1963, entered into force 19 March 1967) 596 UNTS 261, with the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (opened for signature 14 March 1975, not yet in force) UN Doc A/CONF.67/16.

[30] Compare the ILC's 1989 Articles on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier, UN Doc A/44/10, 14, with the ILC's 1989 Optional Protocol on the Status of the Courier and the Bag of International Organizations of a Universal Character, UN Doc A/44/10, 48.

[31] Compare Conclusion 4(1) with Conclusion 4(2) of Conclusions on the Identification of Customary International Law, in ILC, 'Report of the International Law Commission on the Work of Its 70th Session' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 119.

[32] Guideline 1 to Guide to Provisional Application of Treaties, in ILC, 'Report of the International Law Commission on the Work of Its 72nd Session' (26 April–4 June and 5 July–6 August 2021) UN Doc A/76/10, 54 (emphasis added).

[33] See, e.g., Conclusion 1 of Conclusions on Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties, in ILC, 'Report of the International Law Commission on the Work of Its 70th Session' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 13 ('The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.') (hereafter Conclusions on Subsequent Agreements and Subsequent Practice).

2. Two Decades of Continuing Influence

Virtually all ILC projects since 2001 have expressly referred to the ASR, to a greater or lesser degree.[34] Such references are to be expected, given the ASR's treatment of core aspects of international law that undergird different subject matter areas, such as attribution of conduct, breach, and reparation.

Thus, in virtually all topics, the question arises as to what constitutes state conduct pertinent to the issue at hand. Consequently, it is natural to point to the ASR's rules on *attribution*, such as in relation to conduct in expelling noncitizens,[35] conduct pertinent for the identification of customary international law,[36] conduct relevant for treaty interpretation,[37] or conduct resulting in crimes against humanity.[38] Sometimes this is done by borrowing directly language from the ASR; at other times the ASR provide a salient point for comparison.[39]

Conversely, it has been necessary at times for the ILC to clarify that language used in certain rules was *not* intended to signify attribution of conduct for purposes of State responsibility. Thus, when discussing use of the words 'sent by' rather than 'acting on behalf of'

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[34] No express references to the ASR in either texts or commentary may be found for the following topics: Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, in ILC, 'Report of the International Law Commission on the Work of Its 58th Session' (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10, 161; Articles on the Law of Transboundary Aquifers, in ILC, 'Report of the International Law Commission on the Work of Its 60th Session' (5 May–6 June and 7 July–8 August 2008) UN Doc A/63/10, 19; Final report of the Working Group on the Obligation to Extradite or Prosecute (*Aut dedere aut judicare*) (2014) UN Doc A/CN.4/L.844; Final report of the Study Group on the Most-Favoured-Nation Clause (2015) UN Doc A/CN.4/L.852.

[35] Articles on Expulsion of Aliens, in ILC, 'Report of the International Law Commission on the Work of Its 66th Session' (5 May–6 June and 7 July–8 August 2014) UN Doc A/69/10, 21, para. (3); ibid, 37–38, para. (6) (commentary to Articles 2 and 10, citing to ASR rules on attribution for the proposition that the formal act or conduct constituting expulsion must be attributable to the State) (hereafter Articles on Expulsion of Aliens).

[36] Conclusions on Identification of Customary International Law, in ILC, 'Report of the International Law Commission on the Work of Its 70th Session' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 132, para. (2) (commentary to Conclusion 5 on 'Conduct of the State as State practice', explaining that the conduct must be 'of the State' by reference to various elements appearing in ASR Articles 4 and 5).

[37] Conclusions on Subsequent Agreements and Subsequent Practice (n 33) para. (17) (commentary to Conclusion 4 that the meaning of the word 'conduct' should be understood by reference to ASR Article 2, consisting of not only acts, but also omissions including relevant silence).

[38] Articles on Prevention and Punishment of Crimes against Humanity, in ILC, 'Report of the International Law Commission on the Work of Its 71st Session' (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, 48–49, para. (5) (commentary to Article 3 on 'General obligations', quoting the ASR to the effect that '[w]here crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them') (hereafter Articles on Prevention and Punishment of Crimes against Humanity).

[39] Conclusions on Subsequent Agreements and Subsequent Practice (n 33) 37, para. (2) (commentary to Conclusion 5 saying that the use of 'any conduct of a party' actually 'borrows language from article 2(a) of the' ASR); ibid (in noting that use of '[t]he expression "whether in the exercise of its executive, legislative, judicial, or other functions" focuses on the functions of a State, rather than on its organs', and suggesting a comparison with ASR Articles 4 and 5).

to describe the nexus between an 'assisting actor' and the personnel assisting in the protection of persons in the event of disasters, the ILC made a point of indicating a desire not to prejudge issues of attribution, as set forth in the ASR.[40] The ILC also avoided using attribution of conduct as the touchstone for defining the state practice that is relevant for identification of customary international law. The ILC viewed the ASR rules on attribution as helpful in determining whether a certain practice is of the state, but also regarded those rules as potentially embracing conduct that was not pertinent for a customary international law analysis.[41]

The concept of the *breach* an obligation also often arises, and the ILC now finds it convenient simply to refer to the ASR for the pertinent rules in that regard.[42] For example, the ILC's conclusions on *jus cogens* provide: "Any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts."[43] Similarly, at times the issue of taking steps to *prevent* breach is at issue, in which case here too the ILC refers to the ASR's treatment of the concept of prevention.[44] The exact relationship of states to the international obligation under discussion also often arises at the ILC, such as in the context of: a state that is aiding or assisting in acts that constitute crimes against humanity,[45] third states that are reacting to an obligation possessing an interdependent or *erga omnes*

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[40] Articles on the Protection of Persons in the Event of Disasters, in ILC, 'Report of the International Law Commission on the Work of Its 68th Session' (2 May–10 June and 4 July–12 August 2016) UN Doc A/71/10, 27, para. (29) (commentary to Article 3) (hereafter Articles on the Protection of Persons in the Event of Disasters).

[41] See Identification of Customary International Law, Statement of the Chairman of the Drafting Committee (7 August 2014) 11 ('For instance, the 2001 Articles on State Responsibility not only cover conduct of the State itself, but also encompass several cases of conduct by non-State actors that might be attributable to a State for the purpose of [] determining whether its responsibility is engaged or not.').

[42] See, e.g., Guidelines and Annex on Provisional Application of Treaties, in ILC, 'Report of the International Law Commission on the Work of Its 72nd Session' (26 April–4 June and 5 July–6 August 2021) UN Doc A/76/10, 80, para. (2) (stating that Guideline 8, on 'responsibility for breach', 'should be read together with the' ASR and the 2011 Articles on Responsibility of International Organizations 'to the extent that they reflect customary international law').

[43] Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), in ILC, 'Report of the International Law Commission on the Work of Its 73rd Session' (18 April–3 June and 4 July–5 August 2022) UN Doc. A/77/10, 15 (Conclusion 17(2)) (hereafter Conclusions on *Jus Cogens*). The Commission also looked to the ASR when confirming the definition of *jus cogens*, ibid, 28, para. (2) (commentary to Conclusion 3), when explaining a two-step approach for identifying such norms, ibid, 30, para. (6) (commentary to Conclusion 4), when referring to itself as an expert body that is a subsidiary means for determining *jus cogens* norms ibid, 47, para. (10) (commentary to Conclusion 9(2)), when considering how *jus cogens* should be interpreted and applied, ibid 80–81, paras. (3), (5) (commentary to Conclusion 20), and when explaining a non-exhaustive list of such norms as previously referred to in the work of the Commission. Ibid, 85-89, paras. (4), (6)–(15) (commentary to Conclusion 23).

[44] See, e.g., Articles on Prevention and Punishment of Crimes against Humanity (n 38) 49, para. (7) (commentary to Article 3 on the general obligation to prevent of crimes against humanity); Guidelines on Protection of the Atmosphere, in ILC, 'Report of the International Law Commission on the Work of Its 76th Session' (26 April–4 June and 5 July–6 August 2021) UN Doc A/76/10, 28, para. (8), n 83 (commentary to Guideline 3, discussing the obligation of states to exercise due diligence in taking appropriate measures to prevent atmospheric pollution and atmospheric degradation) (hereafter Guidelines on Protection of the Atmosphere).

[45] Articles on Prevention and Punishment of Crimes against Humanity (n 38) 49, para. (6) (commentary to Article 3).

character,[46] third states that are expected to cooperate to bring to an end serious breaches of *jus cogens*,[47] or third states pursuing countermeasures or collective countermeasures so as to induce compliance.[48] Here, too, references to the ASR in the relevant commentary commonly occur.

Once a breach occurs, the issue of *reparation* transcends all areas of international law, so the ASR's treatment of that issue has been confirmed or simply left aside in subsequent ILC topics. For example, in addition to its reiteration in the articles on diplomatic protection (as noted above), the ILC referred multiple times to the ASR and to the work of ASR special rapporteurs when setting forth the relevant standards for reparation in the context of an unlawful expulsion of aliens.[49] In its draft principles on protection of the environment in relation to armed conflicts, the Commission cast its principle on state responsibility in terms of an act causing damage to the environment as entailing state responsibility, and referred to the ASR repeatedly in its commentary.[50] By contrast, although the 2008 Articles on the Law of Transboundary Aquifers (and its commentary) make no reference to the ASR, it is clear that the drafting committee decided not to pursue any provision on compensation because the matter had been addressed in the ASR and therefore did not require any specialized treatment in the articles at hand.[51]

Although less obvious, the ASR has influenced the way the Commission thinks about *potential clashes of international law* between different subject matter areas. For example, the study group on Fragmentation of International Law drew heavily on the ASR in the report

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[46] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi (13 April 2006) UN Doc A/CN.4/L.682, 59–60, para. 109, n 136 (hereafter Fragmentation of International Law Report); ibid, 197–99, paras. 389–90, 393 (drawing upon ASR Article 48 and associated reports of ASR special rapporteurs); ibid, 160, para. 311 (referring to ASR Article 42 and its commentary in the context of discussing interdependent obligations); Principles on Protection of the Environment in Relation to Armed Conflicts, in ILC, 'Report of the International Law Commission on the Work of Its 73rd Session' (18 April–3 June and 4 July–5 August 2022) UN Doc. A/77/10, 160, para. (4) n 747 (hereafter Principles on Environment and Armed Conflict) (drawing upon ASR Article 48 commentary when discussing the collective interest being protected by multilateral environmental law treaties). For background on the "Fragmentation" topic, see Pronto and Wood, *The International Law Commission* (n 2) 609–12. By contrast, the Guidelines on Protection of the Atmosphere stated that Guideline 3 was 'without prejudice to whether or not the obligation to protect the atmosphere is an *erga omnes* obligation in the sense of article 48 of the articles on responsibility of States for internationally wrongful acts, a matter on which there are different views'. Guidelines on Protection of the Atmosphere (n 44) para. (5) (commentary to Guideline 3 on 'Obligation to protect the atmosphere') (internal citation omitted). On the relationship of *erga omnes* obligations to *jus cogens* norms, with references to the ASR, see Conclusions on *Jus Cogens* (n 43) 65, paras. (2)–(4) (commentary to Conclusion 17).

[47] Conclusions on *Jus Cogens* (n 43) 15 (Conclusion 19).

[48] Fragmentation of International Law Report (n 46) 99, para. 190 (discussing countermeasures by third states under ASR Articles 49 or 54); ibid, 83–84, para 156 (discussing collective countermeasures under ASR Article 56).

[49] Articles on Expulsion of Aliens (n 35) 77–78 (commentary to Article 30 on 'Responsibility of States in cases of unlawful expulsion', with references to ASR Part Two, including rules on reparation in its Articles 31 and 34–37).

[50] Principles on Environment and Armed Conflict (n 46) 93 (Principle 9); see ibid, 121-24, paras. (2)–(4), (7), (9)–(10) (commentary to Principle 9); see also ibid, 182, para. (4) (using the ASR on reparation to explain what is meant when "reparation" of the environment is unavailable).

[51] See Shared National Resources, Statement of the Chairman of the Drafting Committee, 14–15 (3 June 2008) (explanation of Draft Article 6 on 'Obligation not to cause significant harm').

finalized by its chair, Martti Koskenniemi.[52] That report was essentially focused on how best to deconflict, when necessary, rules arising in different substantive areas of international law. To that end, the study group found helpful the ASR's treatment of the concept of *lex specialis*[53] and its consideration of the associated question of 'self-contained regimes'.[54] The status of *jus cogens* as a source of international law with a peremptory character featured considerably in the study group's report, which noted the ASR's identification of various examples of *jus cogens*,[55] its indication of certain effects of *jus cogens*,[56] and its discussion of the relationship of *jus cogens* to *erga omnes* obligations.[57] Of perhaps some significance is the study group's assertion that the ASR had a role in confirming the increased acceptance by states and others of the concept of *jus cogens* since its incorporation in the Vienna Convention on the Law of Treaties,[58] an acceptance that prompted the Commission in 2015 to launch a project dedicated to that topic. Indeed, when noting in 2019 that the prohibition on crimes against humanity was *jus cogens*, the ILC referenced the ASR commentary in support.[59]

Such reliance on the ASR when considering conflicts between different subject matter areas also arose for the ILC's Articles on Effects of Armed Conflicts on Treaties, which were completed in 2011.[60] There, the ASR proved helpful to the ILC Secretariat and, in turn, to the ILC when explaining the applicability of human rights standards in the event of armed conflict. In particular, the ILC noted the position taken in ASR that, although the inherent right to self-defence may justify non-performance of certain treaties, 'as to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct'.[61] Similarly, the Commission found in its conclusions on *jus cogens* that circumstances precluding wrongfulness under the rules on State responsibility may not be invoked with regard to an act not in conformity with a *jus cogens* obligation.[62]

Another area of ASR influence has concerned the *relationship of national law to international law*. For example, in the project on reservations to treaties completed in 2011, the

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[52] See generally Helmut Philipp Aust, 'Through the Prism of Diversity – The Articles on State Responsibility in the Light of the ILC Fragmentation Report' (2006) 49 GYIL 165.

[53] Fragmentation of International Law Report (n 46) 38, paras. 63–64; ibid, 50, para. 89; ibid, 62–63, para. 116; ibid, 65–66, paras. 123–24; ibid, 72, para. 135; ibid, 73, para. 137; ibid, 85, para. 160 (drawing upon ASR Article 55 and the associated reports of ASR special rapporteurs).

[54] Ibid, 74–82, paras. 138–52 (drawing upon reports of ASR special rapporteurs).

[55] Ibid, 188–89, para. 374 (addressing the content of *jus cogens*).

[56] Ibid, 99–100, para. 191 (explaining the effect of *jus cogens* on self-contained regimes).

[57] Ibid, 204, para. 405 (quoting verbatim commentary to ASR Article 39).

[58] Ibid, 183–84, para. 363 (finding that '[o]ver the years most of the initial scepticism around the notion itself has tended to vanish' and then citing to the commentary to ASR Article 40).

[59] Articles on Prevention and Punishment of Crimes against Humanity (n 38) 24–25, para. (5) n 21 (commentary to preambular clause recalling that 'that the prohibition of crimes against humanity…is a peremptory norm of general international law (*jus cogens*)').

[60] Articles on the Effects of Armed Conflicts on Treaties, in ILC, 'Report of the International Law Commission on the Work of Its 63rd Session' (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10, 175–78.

[61] Ibid, 210, para. (49) (commentary to the Annex, quoting to Secretariat's Memorandum (UN Doc A/CN.4/550 and Corr.1, para. 32), which in turn referred to the ASR).

[62] Conclusions on *Jus Cogens* (n 43) 15 (Conclusion 18).

ILC conducted a systematic study of the rules and practice associated with the making of reservations, including their definition, the procedure to be followed, and their permissibility and legal effects.[63] The ASR featured in discussing certain aspects of national law, such as the making of reservations that relate to internal law[64] and whether improper assessment of the permissibility of a reservation by a national court might engage a state's responsibility.[65] The ILC has also relied on the ASR when considering a State's due diligence obligation in regulating its business enterprises that operate in an area affected by armed conflict.[66]

Yet the ILC has also made clear when the ASR was not directly relevant to its work. For example, it explained why a reservation that is incompatible with the object and purpose of a treaty falls within the sphere of the law of treaties and not within that of responsibility of states for internationally wrongful acts.[67] Similarly, it explained that enforcement procedures designed to bring a state into compliance with its obligations relating to protection of the atmosphere are to be distinguished from the invocation of State responsibility for non-compliance.[68] Further, so as to not prejudice the potential application of the rules reflected in the ASR, the ILC has at times incorporated a savings clause to avoid any such implication.[69]

3. The ASR as a Turning Point in Seeking the Benediction of States?

Prior to the adoption of the ASR, the dominant vehicle for the ILC's work was in the form of draft 'articles',[70] and, once completed, the Commission typically sent the articles forward with a recommendation that the General Assembly use the articles as a basis for a convention, perhaps by convening a diplomatic conference. That approach was often taken in the first few decades of the Commission's existence, as is reflected in the Commission's projects that led to the 1958 law of the sea conventions, the 1961 and 1963 conventions on diplomatic and consular relations, the 1969 convention on the law of treaties, the 1969 convention on special missions, and the 1975

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[63] Guide to Practice on Reservations to Treaties, in ILC, 'Report of the International Law Commission on the Work of Its 63rd Session' (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10/Add.1, 34.

[64] Ibid, 382–83, para. (5) n 1764 (noting ASR Article 4 in commentary to Guideline 3.1.5.5 on 'Reservations relating to internal law').

[65] Ibid, 396, para. (7) n 1828 (noting ASR Article 4 in commentary to Guideline 3.2 on 'Assessment of the permissibility of reservations').

[66] Principles on Environment and Armed Conflict (n 46) 129, para. (9) n 542 (commentary to Principle 10).

[67] Ibid, 408–09, paras. (3)–(5) (commentary to Guideline 3.3.2 on 'Non-permissibility of reservations and international responsibility'); see also ibid, 423, para. (16) (commentary to Guideline 3.5.0, explaining that 'in the course of assessing the permissibility of interpretative declarations, one must not slip into the domain of responsibility – which, for reservations, is excluded…').

[68] Guidelines on Protection of the Atmosphere (n 44) 49, para. (6) (commentary to Guideline 11 on 'Compliance').

[69] Articles on the Protection of Persons in the Event of Disasters (n 40), 72, para. (4) (commentary to Article 18 on 'Relationship to other rules of international law').

[70] Some observers locate the shift in favoring non-treaty topics in the early 1990s. See, e.g., Laurence R. Helfer and Timothy Meyer, 'The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence' in Curtis A. Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 305. In all likelihood, the shift occurred over a period of time, but the ASR—perhaps because of its prominence—have been seen as a particularly striking example of the ILC shying away from encouraging States to pursue a convention, at least immediately, and thus may have had a particular influence on the ILC in the decades that followed.

convention on the representation of states in their relations with international organizations. Indeed, from its inception until the adoption of the ASR, there were fifteen ILC projects completed in the form of 'articles' that were designed to (and often did) form the basis of a convention, and further projects on a 'code' or a 'statute' that were anticipated for use in a treaty (ultimately, the Rome Statute).[71] In contrast, there were just six ILC projects in this period that were not intended to form the basis for a treaty, mostly 'reports',[72] but also a 'declaration',[73] a set of principles,[74] and a set of model rules.[75]

When the ASR were completed in 2001, however, the Commission refrained from recommending that the General Assembly proceed to use them as the basis for a convention. Rather, the Commission only recommended that the General Assembly 'take note of the' ASR, with the possibility 'at a later stage' of transforming them into a convention.[76] The General Assembly then took note of the draft articles 'and commend[ed] them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action'.[77] The ILC made this choice no doubt in part because the General Assembly had become less enthusiastic about launching resource-intensive multilateral treaty negotiations. Yet part of the reasoning also was likely that, when the General Assembly decides not to pursue such a recommendation, there may be an implication that the Commission's work was not acceptable to states, which in turn may imply that the project failed to capture properly the law concerning that topic.

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[71] Code of Offences against the Peace and Security of Mankind, in ILC, 'Report of the International Law Commission on the Work of Its 9th Session' (28 July 1954) UN Doc A/CN.4/88, 149; Statute for an International Criminal Court, in ILC, 'Report of the International Law Commission on the Work of Its 46th Session' (2 May–22 July 1994) UN Doc A/49/10, 20; Code of Crimes against the Peace and Security of Mankind, in ILC, 'Report of the International Law Commission on the Work of Its 48th Session' (6 May–26 July 1996) UN Doc A/51/10, 15.

[72] Reports on: Ways and Means for Making the Evidence of Customary International Law More Readily Available, in ILC, 'Report of the International Law Commission on the Work of Its 2nd Session' (5 June–29 July 1950) UN Doc A/CN.4/34, 367; Reservations to Multilateral Conventions, in ILC, 'Report of the International Law Commission on the Work of Its 3rd Session' (16 May–27 July 1951) UN Doc A/CN.4/48 and Corr.1 and 2, 125; Extended Participation in General Multilateral Treaties Concluded Under the Auspices of the League of Nations, in ILC, 'Report of the International Law Commission on the Work of Its 15th Session' (6 July 1963) UN Doc A/CN.4/163, 217; Review of the Multilateral Treaty-Making Process, in ILC, 'Report of the International Law Commission on the Work of Its 31st Session' (14 May–3 August 1979) UN Doc A/34/10, 187.

[73] Declaration on Rights and Duties of States, in ILC, 'Report of the International Law Commission on the Work of Its 1st Session' (12 April 1949) UN Doc A/CN.4/13 and Corr. 1–3, 286.

[74] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, in ILC, 'Report of the International Law Commission on the Work of Its 2nd Session' (5 June–29 July 1950) UN Doc A/CN.4/34, 374.

[75] Model Rules on Arbitral Procedure with a general commentary, in ILC, 'Report of the International Law Commission on the Work of Its 10th Session' (28 April–4 July 1958) UN Doc A/CN.4/117, 83.

[76] ILC, 'Report of the International Law Commission on the Work of Its 53rd Session' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, 25, paras. 72–73.

[77] UN Doc A/RES/56/83, para. 3 (12 December 2001). Similar resolutions have followed. See, e.g., UN Doc A/RES/59/35 (2 December 2004); UN Doc A/RES/62/61 (6 December 2007); UN Doc A/RES/65/19 (6 December 2010). See James Crawford and Simon Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 ICLQ 959.

In the two decades since the adoption of the ASR (2001–22), the ILC has continued to produce some final products that are characterized as 'articles', implicitly signaling their availability to serve as a basis of a treaty. These are the eight sets of articles on: prevention of transboundary harm from hazardous activities (2001); diplomatic protection (2006); law of transboundary aquifers (2008); responsibility of international organizations (2011); effects of armed conflicts on treaties (2011); expulsion of aliens (2014); protection of persons in the event of disasters (2016); and prevention and punishment of crimes against humanity (2019). For four of these topics, the ILC recommended that the General Assembly elaborate a convention on the basis of the articles, while for the other four it recommended that the Assembly simply take note of the articles and consider only 'at a later stage' the elaboration of a convention.[78] To date, none of the articles adopted by the ILC since the ASR has been used as the basis for a convention.

Yet, in the same time frame, the Commission has completed even more final products cast as instruments that are *not* intended to be considered as the basis of a treaty. These eleven instruments are characterized in different ways. Some are 'conclusions' on: subsequent agreements and subsequent practice in relation to interpretation of treaties (2018); identification of customary international law (2018); and peremptory norms of general international law (*jus cogens*) (2022). Others are 'principles' on: unilateral declarations of states capable of creating legal obligations (2006); the allocation of loss in the case of transboundary harm arising out of hazardous activities (2006); and protection of the environment in relation to armed conflicts (2022). Some are study or working group 'reports' on: the fragmentation of international law (2006); the obligation to extradite or prosecute (*aut dedere aut judicare*) (2014); and the most-favoured-nation clause (2015) (which may be contrasted with 'articles' in 1978 on the same topic). Finally, some are cast as a 'guide' or 'guidelines' on: practice on reservations to treaties (2011); provisional application of treaties (2021); and on protection of the atmosphere (2021). Many of these outcomes can be fairly described as consisting of both codification and progressive development of international law. Yet none of these have been sent to the General Assembly with a recommendation that they serve as the basis of a convention. Moreover, of the six topics on the agenda of the ILC for 2022, four were of this nature.[79]

The Commission's decision to send forward the ASR in 2001 with such a recommendation was understandable, given the apparent gridlock at the United Nations in pursing the negotiation of conventions based on the ILC's work. As Frank Berman has noted, '[t]his was an area where there could be quite legitimate doubts whether the international treaty process, in its current state, was up to a law-making exercise of so major and fundamental a scope, and doubts at the same time

[78] The ILC decided to recommend to the General Assembly the elaboration of a convention based on the articles on: prevention of transboundary harm from hazardous activities; diplomatic protection; protection of persons in the event of disasters; and prevention and punishment of crimes against humanity. The ILC decided to recommend that the General Assembly take note of the articles, but only consider 'at a later stage' the elaboration of a convention, for: law of transboundary aquifers; responsibility of international organizations; effects of armed conflicts on treaties; and expulsion of aliens.

[79] The two being: immunity of state officials from foreign criminal jurisdiction; and succession of states in respect of State responsibility.

whether a treaty negotiation would or would not solidify agreement on the essential rules'.[80] Moreover, given that the Commission had been criticized over the years for being too rigid in assuming that the end product of the ASR should be a convention, and given that some of the ILC-origin conventions failed to secure many ratifications, it is unsurprising that the Commission would sound a more cautious note for the ASR.[81]

Yet the Commission's decision with respect to the ASR was also controversial, both within and outside the Commission. According to David Caron, 'the particular question of form was intensely argued and narrowly decided' in the Commission, with many members supporting a recommendation that would call for the development of a convention.[82] Caron and others expressed concern that the Commission's approach may have pushed 'the limits of its legitimacy to state what the law is', since several ASR articles involved a contestable development of the law, rather than just codification.[83] An approach whereby the Commission blends codification with progressive development is defensible if the ultimate outcome is the adoption by states of a convention, but such blending in a situation where no further state action is envisaged, and with the expectation that the draft articles may eventually be seen as 'the law', potentially casts the Commission in the role of legislator.

To the extent that such a critique is correct, then it becomes magnified with the strong tendency of the ILC, since adoption of the ASR, to move away from 'articles' and away from recommending adoption of conventions as the ultimate outcome of its work. The ILC is now most likely to adopt 'conclusions', 'principles', or 'guidelines' in which international law may be both codified and progressively developed, but with no expectation that states will collectively accept or reject such instruments.[84] Of course, it remains the case that careful observers can scrutinize closely the ILC's commentary of these products, in the hope of discerning whether the ILC viewed a proposed rule as settled law. Such observers also may seek to excavate from myriad documents the individual reactions of governments to the ILC's product, so as to determine how the ILC's views were received. But the concern expressed by Caron and others in the immediate aftermath of the ASR's adoption about the ILC pushing 'the limits of its legitimacy' would appear prescient and pertinent to this broader legacy of the ASR, in which securing the benediction of states is often abandoned.

Five Keywords

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[80] Franklin Berman, 'The ILC within the UN's Legal Framework: Its Relationship with the Sixth Committee' (2006) 49 GYIL 107, 124.

[81] See, e.g., B.G. Ramcharan, *The International Law Commission* (Martinus Nijhoff 1977) 76; Ian Sinclair, *The International Law Commission* (Cambridge Grotius Publications Ltd 1987) 39.

[82] David D. Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 AJIL 857, 863–64.

[83] Ibid, 858.

[84] See generally Sean D. Murphy, 'Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product' in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff 2013) 29.

ILC, State responsibility, heritage, legacy, history

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