

THE “INJURED STATE” IN THE INTERNATIONAL LAW OF STATE RESPONSIBILITY*

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I. Introduction

The International Law Commission of the United Nations has been tackling the problem of State responsibility since 1955. Nearly half a century has passed, the study of State responsibility at the ILC seems to be reaching its final stage, and it is expected that the second reading of the draft articles will be finalized in the year 2001.

The on-going codification of the law of State responsibility is a unique project in the history of the ILC in the sense that it intends to codify “secondary rules” of international law. The notion of secondary rule in international law may have at least three different meanings according to different references. According to one author, procedural rules, as opposed to substantial rules, constitute secondary rules in terms of their content.¹ Another author makes use of the concept of “secondary rule” in terms of the timing of the application of the rule.² In this sense, the secondary rule is applied after some other (primary) rules have already been applied. One can also assert that the secondary rule is a “rule for rule” or “meta-rule” in terms of a vertical relationship with another rule. Although it must be noted that the draft articles on State responsibility do contain secondary rules in the three senses of the term, Draft Article 40, entitled “Meaning of injured State”, seems to constitute a secondary rule as defined in the third interpretation above, in as much as it does not purport to impose any concrete obligations, or confer any concrete rights, substantial or procedural, on States.

According to the ILC, if it is established that an internationally wrongful act is committed

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¹ Virally, *Panorama du droit international contemporain, Recueil des Cours*, 1983-V, p.165.

² Riphagen suggested that the rules concerning the validity of a treaty in the 1969 Vienna Convention could be called “pre-primary rules.” Sixth report on the content, forms and degrees of international responsibility (part 2 of the draft articles); and “Implementation” (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles), *Yearbook of the International Law Commission*, 1985, II-1, p.17.

by a State, a new legal relationship will arise between States. "Injured State" is a right-holder in the new relationship and, as such, is entitled to demand reparation and, when necessary, to take countermeasures against the author State of the wrongful act.³

It has not been a difficult task to identify the injured State under traditional international law, where State has pursued a responsibility of wrongdoing State by trying to obtain mainly monetary reparation in its bilateral relationship with that State through direct negotiations or by referring their disputes to international courts or tribunals. To identify an injured State, one may have only to ask which State had suffered a material or moral damage by an illegal act of some other State. Or, if an individual has suffered damage, one may have only to ask his or her nationality.

But today, the identification of the injured State seems to have become a much more complicated task if one accepts the widening notion of State responsibility in the codification process of the ILC. First, Article 1 of the draft articles states that *every* internationally wrongful act of a State entails the international responsibility of that State. Especially since the end of the Second World War, an enormous number of international rules have been created, mainly through multilateral treaties, aiming at protecting extra-State or collective interests that are not attributable to a particular State within the circle of addressees of the rules. Since a violation of a rule of this kind may well occur at any time, the ILC is now obliged to carry out the painful task of drawing a precise picture of the new relationship arising from such violation. Second, the draft articles are intended to cover *all* the legal consequences of an internationally wrongful act of a State, including countermeasures. This gives the ILC an additional task of identifying the State that is entitled to take countermeasures against the author State of the wrongful act. Third, international control mechanisms have also been developed by international organs to supervise the implementation of obligations by State parties to the relevant conventions. There is no doubt that these control mechanisms, more or less effective, have contributed to the performance of the international legal order as a whole. But at the same time, these mechanisms, which are usually related to the specific primary rules of international law and as such are to be considered as sub-systems of responsibility, tend to obscure the possible general inter-State regime of responsibility.

The purpose of this essay is threefold. First, Article 40 of the draft articles, although entitled "Meaning of injured State" as late as 1996, had been drafted, based upon the proposal by the then special rapporteur Riphagen, in the 1984 and 1985 sessions of the ILC. We will examine, although succinctly, each paragraph and sub-paragraph of Article 40 by retracing the arguments in the ILC. By so doing, we will try to make it clear the essential elements or factors to be taken into consideration for the identification of an injured State in the general regime of State responsibility. Second, it is undeniable fact that the potentialities of Article 40 has not

³ On the notion of "injured State", Graefrath, *Das Verantwortlichkeitsverhältnis im Völkerrecht und die Definition des „verletzten Staates“*, in: Graefrath (Hrsg.), *Probleme des Völkerrechts 1987*, pp.107-131. Sachariew, *State Responsibility for Multilateral Treaty Violations: Identifying the 'Injured State' and its Legal Status*, *Netherlands International Law Review*, 1988, pp.273-289. Dominicé, *Observation sur les droits de l'État victime d'un fait internationalement illicite*, 1982, reproduced in: Dominicé, *L'ordre juridique international entre tradition et innovation*, 1997, pp.261-316. More recently, Stern, *Responsabilité internationale*, *Répertoire de droit international*, 1998, pp.15-19. Bederman, *Article 40(2)(E) & (F) of the ILC Draft Articles on State Responsibility : Standing of Injured States under Customary International Law and Multinational Treaties*, *ASIL Proceedings*, 1998, pp.291-295.

been well developed in the subsequent draft articles which relate to what kind of secondary rights an injured State will be entitled to claim against a wrongdoing State. In this regard, we will focus our attention on the substantial consequences of an international wrongful act, that is, the cessation of a wrongful act, reparation, satisfaction and guarantee of non-repetition, and try to make them more consonant with the spirit of Article 40. Third, the remaining part of the article will be dedicated to the examination of the difficult problem of "*actio popularis* in international law", which must be closely connected with our subject. We will examine some relevant cases before the International Court of Justice, including the *East Timor* case and the *Genocide Convention* case. In spite of the apparently negative attitudes of the Court's jurisprudence towards the question to date, we will argue that the Court will still be open to the question in the future.

II. Definition of "injured State"

It should first be noted that the whole work of the ILC on State responsibility has been based upon two presuppositions. One is that the proposed State responsibility regime will function only at the inter-State level.⁴ The other, which is closely related, is that the regime is a general and residual one and it does not exclude the possibility of States establishing, by way of treaty or custom, different regimes of responsibility among themselves.⁵

Article 40, paragraph 1, of the draft articles on State responsibility reads:

For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State.

According to the Article, "injured State" means a State whose legal right has been infringed by the wrongful act of another State. This definition of the injured State, although it sounds like a truism, still calls for some comment.

First, this definition, applied to identify the injured State, the right-holder in the new relationships, refers back to the old and primary relationships between States. The task of identifying the secondary right holder is to identify the primary right holder, which is a matter of interpretation of the relevant primary rules of international law. Thus one might ask whether Article 40 itself is to be conceived as a truly secondary rule of international law in terms of the timing of the application of rule.⁶

⁴ According to the ILC, to each and every obligation corresponds *per definitionem* a right of at least one other State. *Yearbook of ILC*, 1985, II-2, p.25.

⁵ Article 37 of the draft articles provides that "The provisions of this Part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act." UN Doc. A/51/10, 1996, p.138. It is true that the Article 37 is envisaged to cover only the second Part of the draft articles, "Content, forms and degrees of international responsibility." It has also been suggested in the work of the ILC, however, that the same kind of escape clause should also be inserted in the first Part. Cf. *Yearbook of ILC*, 1981, I, pp.137(Jagota), 141(Ushakov). The present writer agrees to the suggestion. It seems that, by way of example, States may narrow or widen the circumstances precluding wrongfulness, of which general regime is provided in the Chapter V of the first Part.

⁶ It is interesting to note in this context that, according to Riphagen, Part one of the draft articles deals in reality with the refinement of primary rules. Riphagen, Sixth report, cit., p.19.

Second, the most important consequence of the definition is that a State or States who are entitled to ask for reparation and, if necessary, to take countermeasures are seen as *equivalent* to a right-infringed State or States in its primary relations with a wrongdoing State. Equivalent means no more and no less. *Only* the State or States, and *all of* those, whose primary rights were infringed are entitled to invoke secondary rights in the new relationship. With regard to the first point, it must be said that *only* the right-infringed State or States are considered to be injured State(s). It follows that a State whose “mere interest” has been infringed is not entitled to be an injured State. It might also be added in this context that the ILC has been consistently guided, during the debates on State responsibility, by the dichotomy: legal rights or mere interests. The third notion of “legitimate interests / intérêts légitimes” has not been adopted by the ILC.⁷

With regard to the second point, it must be pointed out that, under this construction, *all* the right-infringed States are, at least under the general regime of responsibility and with some qualifications, considered to be injured States. Although some writers contend otherwise,⁸ the present writer inclines to take the view expressed by the ILC with respect to the definition of injured State. This is because different constructions appear to call for further explanations to such questions as: why and when the State, whose primary right has been infringed, could not have secondary rights to pursue the responsibility of the wrongdoing State. Or conversely, why and when the State, whose primary right has not been infringed, may, nonetheless, have secondary rights to pursue the responsibility of the wrongdoing State? Present international law, where it concerns a general and inter-State regime of responsibility, does not appear to be developed enough to give clear answers to these questions.

III. *Categorizing injured State(s)*

As we have seen above, in order to claim secondary rights of seeking reparation and taking countermeasures against a wrongdoing State, a State must first have had a legal right, in its primary legal relationship, corresponding to an obligation of the latter State, and then that right was infringed by the illegal act of the latter State. For the determination of “injured State”, we must now go back to the question of which State had the legal right in the relevant primary rule of international law. And this is obviously a matter of interpretation of the relevant primary rule of international law. Paragraphs 2 and 3 of Article 40 are said to provide some rebuttable presumptions as to what States, as creators of the primary rules, intended.⁹

⁷ Riphagen indicated in his concluding remarks at the 37th session of the ILC that “he himself agreed that the distinction [between subjective rights and legitimate interests] was particularly relevant in internal legal systems, but did not think that it could be transposed to the field of international law.” *Yearbook of ILC*, 1985, I, p.162 (para.39). Picone contended that the category of legitimate interests is so closely connected with the existence of the centralized and institutionalized public power in internal legal systems as not to be adopted by the international legal order. Picone, *Obblighi reciproci ed obblighi erga omnes degli stati nel campo della protezione internazionale dell'ambiente marino dall'inquinamento*, in: Starace (a cura di), *Diritto internazionale e protezione dell'ambiente marino*, 1983, pp.77-78. For more detailed analysis on the non-applicability of the notion of legitimate interests in the international legal order, Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internazionale generale*, 1983, pp.114-118.

⁸ For example, Conforti argues that there may exist an internationally wrongful act that does not accompany the responsibility, or entail only attenuated responsibility. Conforti, *Diritto internazionale*, 1995. p.364.

⁹ Riphagen, Sixth report, cit., p.6.

Article 40, paragraphs 2 and 3, of the draft articles on State responsibility reads:

2. In particular, "injured State" means:
 - a. if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;
 - b. if the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;
 - c. if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;
 - d. if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;
 - e. if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:
 - i. the right has been created or is established in its favour;
 - ii. the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or
 - iii. the right has been created or is established for the protection of human rights and fundamental freedoms;
 - f. if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.
3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime, all other States.

Paragraphs 2 and 3 of the Article are trying to categorize injured State(s) according to three different criteria: sources of law, interests at stake and results or outcomes of the illegal act. But this combination of the multiple criteria seems to be unsatisfactory.

As regards the sources of law, all the sub-paragraphs of Paragraph 2 of the Article are referring, in some way or other, to sources of international law. Customary international law and bilateral/multilateral treaties constitute primary sources of international law. On the other hand, judgments by international courts and binding decisions by organs of international organizations are secondary sources, in the sense that their binding force is derived from the relevant *compromis* and/or the relevant constituent instruments of the international courts and organizations. It is true that Paragraph 3, which suggests who the injured States are in the case of crimes of State, does not explicitly refer to any source of international law. But, from the drafting history of the relevant articles on crimes of State, it would be safe to say that only general customary international law may give rise to obligations, of which a serious violation

would constitute an international crime of State.¹⁰

In spite of, or precisely because of, their quasi-omnipresence throughout Paragraphs 2 and 3, sources of international law do not appear to be a relevant factor for identifying the injured State.¹¹ What is important for that purpose is not sources of law from which a rule of international law emanates but the circle of addressees of the rule. The injured State(s) must be established, first and foremost, within the circle of addressees of the rule, irrespective of its source.

Having said this, it must be stressed, that all the addressees of a rule are not necessarily injured in their rights under the rule in the concrete case of violation.¹² It must be emphasized, in this regard, that the nature of the interests to be protected by the relevant rules is the most important factor in the identification of the injured State in individual cases of breaches of obligation. International law rules have traditionally been set out in order to protect the interests that are allocatable to a particular State. Thus, for example, there are customary law and multilateral treaty obligations concerning diplomatic relations among States. Although being general and multilateral in terms of addressees of rules, they usually aim at regulating bilateral relations between a sending State of diplomatic missions and a receiving State. If an officer of the receiving State violates premises of a diplomatic mission, the right of the sending State is infringed. This kind of situation falls precisely into Paragraph 2 (e) (i) of Article 40. And one may call the right-infringed State in such a situation a “directly injured State” in the sense that it *personally* suffers some kind of damage, material or moral.

On the other hand, however, there are growing concerns in modern international law about protecting the interests not allocatable to a particular State(s). Riphagen has called these interests “collective interests” or “extra-State interests” in his reports on State responsibility presented to the ILC.¹³ Human rights, the global environment, self-determination of people and common heritage of mankind are, among others, usually listed as examples. Paragraph 2 (e) (iii) & (f) of Article 40 deal with these interests. If obligations to protect these interests are breached by a State, given the decentralized international legal structure at its general level, one can only assume that the corresponding subjective rights belong to all other States (parties). One may call this type of obligation “obligation *erga omnes*” and call all other States (parties) “not directly injured States” in the sense that, although their subjective rights are infringed, they do *not personally* suffer any kind of damage, material or moral.¹⁴

As for the third and last criterion, Paragraph 2 (e) (ii) and Paragraph 3 of Article 40 refer to the results or outcomes of illegal acts. Paragraph 2 (e) (ii) of the article has a rather complex drafting record. But in any event, according to the aforementioned Paragraph 1 of the Article, it is certain that even when the infringement of a right by an act of a State necessarily affects the enjoyment of rights or the performance of obligations by other States, the legal rights of the other States are to be infringed for the purpose of becoming injured States. On the other hand, the famous Paragraph 3 of Article 40 states that in the case of

¹⁰ See on this point, Kawasaki, Crimes of State in International Law, *Shudo Law Review*, 1993, pp.31-33.

¹¹ As indicated by Graefrath, *op.cit.*, pp.117-8, p.124.

¹² According to the terminology employed by Riphagen, the parties to the rule do not necessarily coincide with the parties to the relationship. First report, *Yearbook of ILC*, 1980, II-1, p.128 (para.96).

¹³ Among other places, Riphagen, Sixth report, *cit.*, p.8.

¹⁴ Simma reaffirms that States parties to a treaty can have rights without any corresponding tangible interests. Simma, From Bilateralism to Community Interest in International Law, *Recueil des Cours*, 1994-VI, p.369.

crimes of State, all other States become injured States. However it must be stressed that this is not because the author State committed an international crime, but because it breached an obligation *erga omnes* contained in a norm of general international law. As is mentioned above, Paragraph 2 of the Article already covers what Paragraph 3 is saying.¹⁵ In this sense, Paragraph 3, if kept, would only have a declaratory effect.¹⁶ We would argue that results or outcomes of illegal acts are, along with sources of law as mentioned above, irrelevant to the identification of the injured State.

In the final analysis, Paragraph 2 of the Article now proposed by the ILC could be condensed as follows:

2. In particular, "injured State" means:
 - (a) if the right has been created or is established for the protection of the individual interests of a State or States, that State or States;
 - (b) if the right has been created or is established for the protection of the extra-State interests or the collective interests of States, all other State addressees of the relevant rule of international law.

Some comment must be added to this version. With regard to sub-paragraph (a), it may happen that one violation of an obligation by a State infringes simultaneously the individual rights of more than one State.¹⁷

It may also happen that one violation of an obligation by a State infringes simultaneously the individual right of one State and the collective rights of all other States. In August 1990, Iraq's army invaded the territory of Kuwait and soon thereafter the Iraq's Government declared the annexation of Kuwait. It is evident that this act of aggression by Iraq infringed not only the individual right of Kuwait but also the collective interests of all other States.¹⁸ It is true that the Security Council adopted Resolution 661, which ordered all other States to take economic sanctions against Iraq. But as we suggested on other occasion,¹⁹ the measures taken by several States *before* the adoption of the resolution, the measures adopted by States that are *not members* of the United Nations, and the measures going *beyond* the scope of the resolution, if not retorsions, would call for other justifications based on general international law in addition to the resolution. It would be safe to say, in the final analysis, that such measures

¹⁵ Riphagen observed that: "In fact the whole definition of an international crime in article 19, paragraph 2, seems to presuppose the recognition of a collective interest of all (other) States." Riphagen, Sixth report, cit., p.8.

¹⁶ Cf. Tomuschat, *International Crimes by States: An Endangered Species?*, in: Wellens (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy*, 1998, p.262.

¹⁷ In the *M/V "Saiga" (No.2)* case, the International Tribunal for the Law of the Sea indicated that a ship should be considered as a unit, as regards the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings, and that the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The Court went on to say that the nationalities of these persons are not relevant. International Tribunal for the Law of the Sea, the *M/V "Saiga" (No.2)* case, 1 July 1999, paragraph 106. <http://www.un.org/Depts/los/ITLOS/Judg_E.htm>; However, some writers considered otherwise with regard to similar situations. Elagab, *The Legality of Non-forcible Counter-measures in International Law*, 1988, p.57. Bleckmann, *The Subjective Right in Public International Law, German Yearbook of International Law*, 1985, p.157.

¹⁸ One might rather assume that in this case Iraq violated two distinct obligations simultaneously, the obligation to respect the territorial integrity of other State and the obligation not to disturb seriously international peace and security by the act of aggression.

¹⁹ Kawasaki, *op. cit.*, p.35.

constitute countermeasures by the not directly injured States under the general regime of State responsibility.

IV. *Substantial legal consequences of internationally wrongful acts*

An internationally wrongful act of a State will distort, in some way or other, the legal situations existing between itself and the injured State(s) in the past, present and future. So the aim of establishing legal consequences for internationally wrongful acts is to restore normal relations.

With regard to the present, a State, whose conduct constitutes an internationally wrongful act with a continuing character, is under an obligation to cease that conduct (Article 41 of the draft articles). It has been discussed whether or not the obligation to cease illegal conduct constitutes a new and secondary obligation imposed upon the author State under the State responsibility regime or not. The International Law Commission stated that the obligation to stop the wrongful act lies in-between primary rules and secondary rules.²⁰ In this respect, it should be pointed out that the author State is requested to cease its illegal conduct only to the extent that the original obligation is still valid for that State.²¹ For this reason, the present writer inclines the view that the obligation to stop the wrongful act is more closely related to the original primary rule of conduct.

The same consideration holds true with regard to “assurances and guarantees of non-repetition” (Article 46),²² which focuses more on the future conducts of the author State. Article 42, paragraph 1, of the draft articles²³ refers to “assurances and guarantees of non-repetition” as one means of reparation. But we would suggest that the assurance of non-repetition, if not construed as a form of satisfaction, is autonomous and has a function distinct from reparation, in the sense that it is future-oriented and only required so long as the relevant primary rule is valid for the State which committed the wrongful act.²⁴

²⁰ *Yearbook of ILC*, 1993, II-2, p.55.

²¹ In the *Rainbow Warrior* case, the arbitration tribunal stated that: “... this conduct, namely to keep the two agents in Paris, is no longer unlawful, since the international obligation expired on 22 July 1989. Today, France is no longer obliged to return the two agents to Hao and submit them to the special regime.” The tribunal did not fail to add that: “This does not mean that the French Government is exempt from responsibility on account of the previous breaches of its obligations, committed while these obligations were in force.” *International Law Reports*, vol.82, p.573 (para.114), p.568 (para.106).

²² UN Doc. A/51/10, 1996, p.143.

²³ UN Doc. A/51/10, 1996, p.141.

²⁴ It is undeniable that the injured State may request the author State to assure non-repetition of the wrongful act. But one can still pose the following question: Would it be possible to formulate the assurance of non-repetition in terms of *obligation*? Would it be possible for the injured State(s) to take or continue to take countermeasures against an author State for the sole reason that the author State does not assure or guarantee the non-repetition? The answer might be yes with regard to serious violations of obligations *erga omnes* under general international law rules, be it called crimes of State or not. It must be recalled, in this context, that the Security Council, in its resolution 687 (1991), demanded Iraq to unconditionally accept the destruction, removal, or rendering harmless of all chemical and biological weapons and ordered all States to continue economic sanctions against Iraq. In 1992, the Security Council adopted resolution 748, in which the Council demanded the Libyan Government to commit itself definitively to cease all forms of terrorist action, and at the same time decided that all States should adopt sanction measures until the Libyan Government has complied with the Council’s demand. Spinedi indicates that injured States may take countermeasures against a State who has committed a crime of State, even after reparations have been made. Spinedi, *Responsabilità internazionale*, *Enciclopedia giuridica*, XXVII, 1991, p.8.

In contrast to the cessation and the assurance of non-repetition of a wrongful act, the function of reparation is past-oriented. The forms of reparation may be varied according to the circumstances and the nature of the damage caused by the wrongful act. But, as a starting point, it would be safe to say that it is a general principle of international law that full reparation must be made in the form of restitution in kind, pecuniary compensation and satisfaction, either singly or in combination.²⁵ Which form of reparation is prevalent and how far injured State(s) may claim the right for reparation in concrete case will depend on the nature and the suffered subject of damage caused by the internationally wrongful act of a State.

First, with regard to material damage suffered by a directly injured State, as in the *Corfu Channel* case,²⁶ the injured State is entitled to obtain restitution in kind or pecuniary compensation from the author State of the wrongful act.

Second, with regard to moral damage suffered by a directly injured State, the injured State is entitled to obtain from the author State pecuniary compensation and/or satisfaction. Article 45, paragraph 2 (c), provides that damages, reflecting the gravity of the infringement, should be paid in cases of gross infringement of rights of a [directly] injured State. The International Law Commission stated that this part of the article reflects international practice including the award made by the Secretary General of the United Nations in the *Rainbow Warrior* case.²⁷ In the opinion of this writer, however, the damages in question might rather well fall within Article 44,²⁸ which is entitled "Compensation", and thus might well cover the economically assessable [moral] damage sustained by the injured State. Regarding the moral damage suffered by a directly injured State, the practice of declaratory judgments by international courts and tribunals deserves a mention. In the *M/V "Saiga" (No.2)* case, the International Tribunal for the Law of the Sea declared that Guinea had acted wrongfully and had violated the rights of Saint Vincent and the Grenadines by arresting the *Saiga* in the circumstances of the case and by using excessive force. The Tribunal then went on to state that this declaration of illegality constituted adequate reparation [for the moral damage suffered by Saint Vincent and the Grenadines].²⁹ Although it is evident that this part of the sentence followed preceding international law cases, such as the *Corfu Channel* case and the *Rainbow Warrior* case, this kind of declaration by international tribunals should not be considered so much a part of the general regime of State responsibility in international law but as one of its sub-systems. This is because in the general regime of State responsibility, reparation or satisfaction should be formulated, as remarked by Dominicé and Conforti,³⁰ as an obligation of *prestation* incumbent upon the author State of the illegal act.

Turning to material and/or moral damage suffered by individuals, the ILC explains that

²⁵ Cf. Article 42 of the draft articles, UN Doc. A/51/10, 1996, p.141-2. On the contrary, Iovane considers restitution, compensation and satisfaction *separately*, and reaches the conclusion that there exists no general regime of reparation in international law. Iovane, *La riparazione nella teoria e nella prassi dell'illecito internazionale*, 1990.

²⁶ In the *Corfu Channel* case, the International Court of Justice decided that Albania was responsible for the explosion of the British warships in its waters, and for the damage and loss of human life that resulted therefrom. The Court also fixed the amount of compensation due from Albania to the United Kingdom as £ 843,947. *ICJ Reports 1949*, p.36, p.250.

²⁷ *Yearbook of ILC*, 1993, II-2, pp.79-80.

²⁸ UN Doc. A/51/10, 1996, p.142.

²⁹ International Tribunal for the Law of the Sea, the *M/V "Saiga" (No.2)* case, cit, paragraph 176.

³⁰ Dominicé, *La satisfaction en droit des gens*, *Mélanges Georges Perrin*, 1984, p.112. Conforti, *op. cit.*, p.373.

such damage would be construed as “material damage” suffered by the national State of the individual victims and that national State, as a directly injured State, would be entitled to obtain compensation from the author State for that damage. But this construction seems to be unsatisfactory. First, under this construction, there will be no room in the general regime of State responsibility for apologies made by author States directly to individual victims.³¹ Article 45 deals only with State to State satisfaction. Second, it is evident that the ILC followed this reasoning when explaining the situation in which States enjoy the right to diplomatic protection for their own nationals. Our argument is, however, that the institution of diplomatic protection constitutes a sub-system of State responsibility and that, under the general and main system of responsibility, reparation must be made to the victims,³² whether States or individuals.

This consideration will lead to the most difficult problem of whether and to what extent not directly injured States may invoke secondary rights against the wrongdoing State in the general regime of State responsibility. The draft articles, surprisingly, seem to say nothing in this respect. It would follow that the subsequent draft articles on the legal consequences of illegal acts have not followed up Article 40.³³ As a starting point to tackle the problem, it must first be confirmed that not directly injured States, if not simultaneously considered as a directly injured State as in the case of the victim State of aggression, do not personally suffer any damage, material or moral, by the illegal act. Some observations will be drawn from there.

First, it can be said that not directly injured States are entitled to seek, when necessary, the cessation and the assurance of non-repetition of the wrongful act from the author State of that act.³⁴ To explain the ability of not directly injured States, there seems to be no need to introduce such a constructive concept as “legal injury,” which will cease to be merely redundant (Occam’s razor). As tacitly indicated in Article 3,³⁵ damage is not an essential

³¹ It is reported that, in the *Rainbow Warrior* case, the French Government sent a letter of regrets to the wife of the victim. Cf. Dominicé, *De la réparation constructive du préjudice immatériel souffert par un Etat, Liber amicorum en hommage au professeur Eduardo Jiménez Aréchaga*, I, 1994, p.506.

³² According to the stimulating suggestion by Stern, legal consequences of the violation of a norm have three dimensions: cessation of the wrongful act oriented towards the legal order, reparation towards the victim, and sanction measures towards the wrongdoer. Stern, *Conclusions générales, La responsabilité dans le système international*, 1991, pp.335-336. de Hoogh argues that, in cases of breaches of human rights obligations, compensation should be paid, not to the injured State, but to victims. de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*, 1996, p.159.

³³ By way of example, Article 44, paragraph 1, provides that: “The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, ...” This paragraph is dealing with only the situations in which directly injured State is involved. In this context, it is expected that the concept of obligations *erga omnes* will be more reflected in the draft articles under the present special rapporteur Crawford. See Crawford, *First report on State responsibility*, A/CN.4/490/Add.3, 11 May 1998, p.9 (para.98).

³⁴ The International Criminal Tribunal for the former Yugoslavia indicated that: “[T]he prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitute a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.” *Prosecutor v. Auto Furundzija*, Judgment, 10 December 1998, para.151. <<http://www.un.org/icty/index.html>>

³⁵ UN Doc. A/51/10, 1996, p.126.

element of an internationally wrongful act of a State.

This is, however, not to suggest, of course, that damage plays no role in the system of State responsibility. Rather, as indicated above, damage must be considered as a prerequisite for reparation. Consequently, our second observation is that, contrary to cases seeking the cessation and the assurance of non-repetition, not directly injured States may *not* be entitled to *obtain* restitution in kind, compensation and satisfaction from the wrongful State. That is because restitution in kind and satisfaction must be made, by definition, to the true victims. As for monetary compensation, if not directly injured States actually obtain some compensation without any damage attributable to them, that would amount to a kind of undue profit.

Having said this, some questions still remain. May not not directly injured States be entitled to demand an author State, who has contaminated Antarctica with radioactive wastes, to provide restitution in kind? Or, may not not directly injured States be entitled to demand the author State of genocide to provide compensation for its own nationals? In each case, not directly injured States suffer neither personal material damage nor personal moral damage. But the damage to the Antarctic environment remains and so does that of the individual victims of genocide. Such damage should be taken into consideration in the *general regime* of State responsibility.

V. *Actio popularis in international law?*

There has been much discussion among international law scholars about whether the institution of *actio popularis* is recognized in international law. In this vein, the following *obiter* of the International Court of Justice in the *South West Africa* (Second Phase) cases has often been cited as evidence against international recognition:

Looked at in another way moreover, the argument amounts to a plea that the Court should allow the equivalent of an "*actio popularis*", or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 (c), of its Statute.³⁶

Despite this *obiter*, our argument here is that, viewed from the relevant jurisprudence including the *South West Africa* cases, the International Court of Justice would not go so far as to deny categorically the possibility of States taking such action.

Before entering into an analysis of the jurisprudence, we should first pose an antecedent question of whether it would be appropriate to use the term *actio popularis* in order to describe the relevant situation in the international legal domain. *Actio popularis* has been developed under municipal law systems as a kind of action against administrative acts of public organs. The international law system on the other hand, founded on an inter-State horizontal order, has quite a different structure from municipal law systems.³⁷ In this sense, it must be recognized that the second sentence of the *obiter* explains the difference between the two legal

³⁶ *ICJ Reports 1966*, p.47 (para.88).

³⁷ Lattanzi, *op.cit.*, pp.118-120.

orders.

But it must be added that the correctness of the second sentence does not necessarily warrant that of the first. To point out the structural difference between two legal orders does not necessarily lead to the conclusion that there would be no room in international legal order to admit a kind of a-technical *actio popularis* to protect collective interests of the international community.

In international legal order there is no general and common law system of adjudication. International courts and tribunals now existing are all established by specific treaties concluded among States or resolutions of the relevant international organizations. In addition, basically speaking, international courts can exercise their jurisdictions only when State parties to a dispute, in advance or after the occurrence of the dispute, consent. Given the non-general and non-compulsory character of international adjudication, we would now proceed to our arguments on the availability to not directly injured States of international courts or tribunals.

First, it must be said that if not directly injured States and the author State agree, after the occurrence of the dispute, to bring their case to an international court, there would be no obstacle for not directly injured States to make use of the court, to the extent that the subject matter of the dispute is within the reach of the court. But it must be admitted that this will hardly ever occur. Second, there may be a case in which a jurisdictional clause in a treaty, explicitly or implicitly, recognizes such a possibility.³⁸ As for these two cases, there would be no need for further arguments, at least in terms of the question of the availability of courts to not directly injured States.

So the remaining questions relate to the situation in which jurisdictional clause in a treaty is not certain in this respect, and especially with regard to the International Court of Justice, the situation in which a dispute is brought before the Court through the declaration of acceptance of the optional clause on the compulsory jurisdiction of the Court. We will examine some relevant jurisprudence of the Court.

In the *South West Africa* (Second Phase) cases, the Court's reasoning to reject the claims of Ethiopia and Liberia was mainly based on the following two points: (1) The applicants did not possess any separate self-contained right to require the due performance of the Mandate in discharge of the "sacred trust". This right was vested exclusively in the League, and was exercised through its competent organs.³⁹ (2) The substantive provisions of the Mandate were classified into two types. On the one hand, there were the articles defining the Mandatory's powers and its obligations in respect of the inhabitants of the territory and towards the League and its organs ("conduct of mandate" provisions). On the other hand, there were articles conferring certain rights relative to the mandated territory directly upon the members of the League as individual States, or in favor of their nationals ("special interests" provisions). The jurisdictional clause was inserted in the Mandate for the sole purpose of ensuring the performance of the "special interests" provisions.⁴⁰

We can restate this reasoning of the Court, in terms of State responsibility theory, as follows: (1) The supervisory mechanism by the competent organs of the League constituted a *sub-system* for the due performance of the Mandate. And as such, it excluded the right of

³⁸ One can cite, as an example, Articles 24 and 48 of the European Convention on Human Rights.

³⁹ *ICJ Reports 1966*, p.29 (para.33).

⁴⁰ *ICJ Reports 1966*, p.20 (para.10), pp.43-44 (paras.77-79).

member States to take actions against non-performance of the Mandate. (2) Only a *directly injured State* could make use of the jurisdictional clause under the Mandate to protect their own or their nationals' interests in the mandated territory.

These arguments by the Court could be disputed as a matter of interpretation of Article 37 of the draft articles on State responsibility⁴¹ and the jurisdictional clause under the Mandate. But in any event, it must be pointed out that the substantive rights of the member States of the League under the Covenant are not necessarily denied by these arguments.⁴² We could argue that the substantive rights of the member States were infringed by the non-performance of the Mandate, and the member States became *not-directly injured States*, even though the sub-system of the Council of the League might have excluded the assertion of their rights, and even though the jurisdictional clause might have been invoked by directly injured States only.

Turning to the other relevant jurisprudence of the International Court of Justice, we must refer to the *Nuclear Tests* case and the *East Timor* case. These two cases are different from the *South West Africa* cases in that, while in the *South West Africa* cases, Ethiopia and Liberia were before the Court as not directly injured States, in the *Nuclear Tests* case and the *East Timor* case, the applicant States asserted their rights not only as not directly injured States but also as directly injured States.

In the *Nuclear Tests* case, the applicant States, Australia and New Zealand, first asserted that atmospheric nuclear tests by any country would infringe upon the collective interest of the international community.⁴³ And then they also claimed that the deposit of radio-active fall-out on their territories would violate their territorial sovereignty and thus infringe on their individual interests.⁴⁴

In 1973 the Court ordered provisional measures which in particular requested the French Government to avoid nuclear tests causing the deposits of radio-active fall-out on the applicants' territories. It would follow that the orders given by the Court in this case were mainly aiming at protecting the individual rights of the applicant States.⁴⁵

Although it is true that in the end, the Court, in its 1974 judgments, refused to continue the proceedings and to examine the merits of the case, what should not go unnoted is that the reason why the Court decided to do so was not because the applicants had asserted their

⁴¹ See supra note 5. Especially the interpretation of "where and to the extent" will be at issue.

⁴² Minagawa stated that: "It is undeniable that the international obligations of the Mandatory for the performance of a sacred trust are of *erga omnes*" type, whether the right to claim its obligations is vested in the international organization or in its Members as well. Consequently, any international act of the Mandatory violating the solemn obligations or the situation brought about as a result should be regarded as illegal *erga omnes*, that is, to all other State or the community of States as a whole." Minagawa, *Essentiality and Reality of International Jus Cogens*, *Hitotsubashi Journal of Law and Politics*, Vol.12, 1984, p.6.

⁴³ Australia stated in its proceedings before the Court: "The feature common to all the specific expressions and confirmations of the rule as indicated above is that they are couched in terms of an *erga omnes* obligation and not in terms of an obligation owed to particular States. The duty to refrain from atmospheric nuclear testing is stated in absolute terms, rather than in terms relative to the incident of the effect of nuclear testing upon particular States. The duty is thus owed to the international community; it is a duty of every State towards every other States." Australian memorial on jurisdiction and admissibility, *ICJ Pleadings, Nuclear Tests Cases, Vol. I*, pp.333-334.

⁴⁴ The claims formulated by the applicants are reproduced in: *ICJ Reports 1973*, p.103 (Australia) and p.139 (New Zealand).

⁴⁵ *ICJ Reports 1973*, p.142 (Australia) and p.106 (New Zealand).

collective rights to protect the community interests of the international society, but simply because the object of the suit had, according to the Court's judgment, disappeared.⁴⁶

The *East Timor* case is similar to the *Nuclear Tests* case in terms of the basis for the jurisdiction of the Court, that is, the declarations to accept the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute. Another similarity lies in the fact that in the *East Timor* case the applicant State, Portugal, not only claimed its individual rights as the administering Power of the Territory of East Timor, but also invoked the right of the people of East Timor to self-determination as a not directly injured State. Portugal went on to ask the Court to declare that Australia has incurred international responsibility and has caused damage, for which it owes reparation to the people of East Timor, in such form and manner as may be indicated by the Court, given the nature of the obligations breached.⁴⁷

Again in this case, in the end, the Court decided not to exercise its jurisdiction. But this decision was based on the consideration that it could not exercise the jurisdiction in the absence of Indonesia, the lawfulness of the Indonesia's conduct must being the prerequisite to the decision on the claims of Portugal. So the question of the standing of Portugal, including as a not directly injured State, was not discussed.

In the *Application of the Genocide Convention (Preliminary Objections)* case, the International Court of Justice found that the Application filed by the Republic of Bosnia and Herzegovina on the basis of the Article IX of the Genocide Convention was admissible.⁴⁸ It is evident that in this case Bosnia and Herzegovina, as a directly injured State, asserted its own individual rights under the Convention.⁴⁹ It is also true in this case that the Court referred to the notion of obligations *erga omnes* only in terms of the territorial applicability of the Convention.⁵⁰ To that extent this case might be thought to be irrelevant to our concern.

Nevertheless this case calls for our attention. First, the Court recognized that the responsibility of a State for an act of genocide perpetrated by the State itself is not excluded from the scope of the Convention. Second, as the Convention has no territorial limitation in terms of its application, an act of genocide perpetrated by the State itself in its own territory is also not excluded from the scope of the Convention. Third, the Court observed that Article IX covers any kind of State responsibility. Fourth, Article IX is a jurisdictional clause through which States parties may bring a case before the Court. Here one may pose the question of who may then make use of the article in this kind of situation. The answer would be that there is the possibility that not directly injured State could bring a case before the Court on the basis of Article IX of the Genocide Convention. It is reported, in fact, that the Australian Government at one point indicated some interest in bringing a claim against the Khmer Rouge before the International Court of Justice.⁵¹

⁴⁶ *ICJ Reports 1974*, p.272 (Australia) and p.478 (New Zealand).

⁴⁷ *ICJ Reports 1995*, p.95.

⁴⁸ *ICJ Reports 1996 (II)*, p.624.

⁴⁹ Judge Oda, however, maintained in his declaration that what should be protected by the Convention is not the particular rights of any individual State and Yugoslavia did not violate the rights of Bosnia and Herzegovina under the Convention. *ICJ Reports 1996 (II)*, p.628 (para. 6).

⁵⁰ *ICJ Reports 1996 (II)*, p.616 (para.31).

⁵¹ LeBlanc, *The United States and the Genocide Convention*, 1991, p.208.

VI. *Conclusions*

We have examined the notion of "injured State" in the law of State responsibility in international law. We have first focused our attention on Article 40 of the draft articles on State responsibility of the ILC. Our tentative conclusions with this regard is that, while Paragraph 1 of the article should be retained in its entirety, Paragraphs 2 and 3 need to be redrafted considerably. Our proposal for the possible redrafted Paragraph 2 is nothing more than a simplified and purified presentation of the original idea of Riphagen.

We have then considered the possible substantial legal consequences of an internationally wrongful act of State. First, we have suggested that the function of reparation should be considered past-oriented and damage should be a prerequisite of reparation. It would not be appropriate, in this respect, to introduce the notion of "legal injury" to widen the scope of reparation. Secondly, reparation, may it be restitution in kind, compensation or satisfaction, should be formulated, even within the general regime of State responsibility, to be made towards the true victims. For that purpose, the traditional institution of diplomatic protection, which has considered the national State of an individual victim as a directly injured State, might be treated rather as a sub-system of State responsibility, in the sense that it has allowed States to obtain reparation for the damage not caused to them personally.

Our examination extended to the problem of "*actio popularis* in international law". We have examined the appropriateness of the terminology in international law, the peculiarity of the international adjudication and the conditions of setting jurisdictional links. Our brief analysis of the relevant case law of the International Court of Justice shows that the Court is still not closed to the claim presented by a not directly injured State in the future.

This essay has shown only that the general regime of State responsibility and the special regime of the International Court of Justice are both in theory open to not directly injured States for the protection of extra-State or collective interests in international law. It would be difficult, in the opinion of this writer, to reach the opposite conclusion on this question. But, at the same time, it must be recognized that searching for the general regime of State responsibility without considering the possible "contents, forms and degrees" of sub-systems of responsibility must have its own inherent limits. More integrated research should be done on this subject.