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Part II International Responsibility—Development and Relation with Other Laws, Ch.4 The Development of the Law of Responsibility Through the Case Law

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(p. 37) Chapter 4 The Development of the Law of Responsibility Through the Case Law

How much has the codification of State responsibility, which is in the process of completion, been dependent on established case law? How much significance will the codification project accord to future case law?

The second question is less difficult. It is sufficient to bear in mind that case law retains its own utility where it creates customary law, even after an area of international law has been codified. Furthermore, codification can also further the development of new case law, insofar as it consists of elements that develop the law—such as the articles on 'serious breaches of obligations owed to the international community as a whole'—that remain controversial. In short, the increase of treaty regimes and the modes of peaceful settlement (eg in the law of the sea and in the framework of the WTO) favours novel answers to technical questions, and is capable either of being at variance with or of reinforcing the solutions advocated today.

It is a far from easy task to evaluate the contribution of but one of the formal sources of law to the systematic construction of the law of responsibility, especially given the complex relationship of case law with the other sources of law. Since we are dealing with international case law, it must be noted that it constitutes a medium for the development of customary rules, especially with a view to reinforcing their scope and sometimes their precision—just as case law uses customary rules for its own elaboration. In this way, one can observe a circular relationship between case law and doctrine: at first, the case law is used by the doctrine to support its position. (p. 38) Subsequently doctrine will be invoked by courts or tribunals to support their assertion of the existence of a rule of law. The fact that, unlike other areas of international law, much of the subject of 'international responsibility' has been the object of multiple official or doctrinal attempts at codification for close to a century, introduces an additional complication. The formulations used in these codification projects are based on case law developed at various points in time and taken into account by the rapporteurs and codification bodies, either as aspects of doctrine or as examples of practice. But these formulations have in turn played an influential role in relation to the practice of States and dispute resolution bodies in the period between the two official codification attempts (of 1930 and 2001). The interdependence of the various sources of law in the complex process of the formulation of the law on international responsibility is undeniable.

1 The importance of case law in the development of the international law of responsibility

(a) Raison d'être

Both the importance and deficiencies of case law as a source of law can be explained by reference to two sets of factors. One is linked to the historical development of international law, the other to the structure of the international community. The first is concerned with the development of substantive rules of

international law ('primary obligations' in the terminology of the international law on responsibility), the other with the multiplication of bodies charged with the judicial settlement of disputes (international courts and tribunals). Developments in both these areas have accelerated in a spectacular fashion during the 20th century, even though the origins of those changes are very recent. But this trend is in part counteracted by the structure of the international community, especially by the position accorded to State sovereignty, the importance of the principle of consent in inter-State relations and the practice of self-help.

Thus Ago supported the view that the silence in the case law on this matter was due to the fact that where States need a third party in order to determine reparation, they do not have to seek third party authorization to apply a 'sanction' to another State.[1] Similarly, the absence of an international public prosecutor has tended to limit legal initiatives to those States classed as 'injured'. Conversely, the distinctive difficulties in proving international responsibility and the sensitivity of States in this matter require that, unlike other questions—especially those concerning territorial delimitation—a detailed answer cannot be found by way of treaty and will be remitted to some third party, often with ambiguous terms of reference.

One of the corollaries of this close link between the content of substantive international law and the contribution of the case law to the area of responsibility is that the latter has partly lost its significance in the contemporary world: either certain precedents arise from obsolete treaty situations (peace treaties in particular), or they contradict customary rules or fundamental obligations (prohibition of slavery, colonialism, or acquisition of territory by the use of force).

(p. 39) (b) Evolution of the case law

The historical origins can be found from the end of the 18th century when a progressive institutionalization of inter-State arbitration took place. This arose mainly from agreements to litigate breaches of private law rights during the first wars of independence, especially in North and South America, as well as inter-State arbitration linked to breaches of the laws of war, especially in connection with neutral States. The relevance of this arbitral case law is limited, since the search for amicable solutions tended to dominate.

The 'classic' period stretches from the last third of the 19th century to the middle of the 20th century. The relevance of precedent was only slowly taken up and remains limited to technical rules; arbitration remained the favoured form, especially where State responsibility for the violation of private interests was concerned. The growth of the corpus of case law is undeniable, nourished by the conclusion of *compromis* linked to numerous civil wars on the American continent, the default by States on their obligations in relation international debt, and a series of international armed conflicts, in particular the First World War.[2] The substantive coherence of that growth is a result of the homogeneity of rules established by way of inter-State compromise and principles accepted by arbitrators under the influence of the developed States of that time. The first attempts at codification which took place between the two World Wars reflect not only a conviction that the law on responsibility had been sufficiently consolidated through the case law, but also reveal a certain concentration on an area of law suited to the exercise of diplomatic protection. Thus, the Commentary to many articles in Part One of the ILC's Articles refers to the Codification Conference of 1930. The contribution of the case law is as significant for the substantive rules as it is for the procedural rules: admissibility of claims, exhaustion of internal remedies, principles for determining the form of reparation and especially the calculation of damages. The precedents are still few and ambiguous in certain areas, especially where environmental damage is concerned. In this area, regard must be had to the *Trail Smelter* case[3] and also, in a lesser measure, to the *Lac Lanoux* case[4] or even to *Armed Activities on the Territory of the Congo* (dealing with the exploitation of natural resources during an occupation by armed forces).[5]

In recent times there has been a remarkable development of the importance attributed to case law, both in qualitative and quantitative terms. The precedents of permanent courts and tribunals have become ever more important, even though arbitration has experienced a significant renaissance in the last few decades (ICSID tribunals, the Iran-United States Claims Tribunal, etc). New areas of law have lent themselves to the peaceful settlement of questions of responsibility: human rights law and humanitarian law, international economic law, responsibility arising from lawful acts, and responsibility of other actors such as international organizations. Further, the development of the possibility of direct recourse on the part of

individuals and companies has partly disconnected the case law from the previous limitations imposed by the sovereignty of States.

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(p. 40) The impact of the case law extends beyond the framework of the current project on State responsibility in numerous areas: 'objective' responsibility, contractual responsibility, methods for the evaluation of harm, conditions for the exercise of diplomatic protection—which concerns certain aspects of admissibility, such as nationality of claims or exhaustion of local remedies—or the invocation of the rules on responsibility by entities other than individuals and States. Conversely, case law can prove to be unhelpful where the most controversial aspects of responsibility are concerned, especially in the area of international 'crime' or 'objective' responsibility.

(c) Difficulties in interpreting the case law

The authority of precedent varies greatly. It depends on:

- the legal basis of the decision: a judgment, advisory opinion or verdict based on a particular treaty is less significant than one based on general principles or customary principles. To be more precise, what matters in this respect are any directions to the arbitrators or judges in the *compromis*: a general or specific reference to international law leaves scope to apply the various sources of international law. Conversely, indications as to precise solutions correspondingly restrict the judges and arbitrators;
- the quality of the reasoning;
- the isolated character of the precedent, or conversely, its recurring character;
- the authority of the court or arbitrator;
- the degree of specificity of the dispute: the case law on war reparations for example is governed by criteria fixed in peace treaties that are often so unequal that one would hesitate to turn them into a general rule;
- the degree of coherence of the relevant precedents.

But there are many difficulties in analysing individual cases. First, because of the way in which international justice functions; it necessarily deals with both procedural questions (concerning competence or admissibility) as well as substantive ones: the resolution of a dispute is often the result of considerations concerning both types of questions.

Second, because arbitration or judicial settlement of disputes often rests on a special basis in the form of a *compromis*; this may exclude the tribunal from deciding particular aspects of the problem (especially where the principle of responsibility is concerned), since the solution on such a point may already have been determined. The relevance of the case law in such cases is correspondingly affected.

Third, a court or tribunal is as much concerned with determining the content of rights and obligations, as with the way in which responsibility is incurred. Their objective, after all, is that of settling concrete disputes. Often the result is a blend of primary and secondary rules in the reasoning, which can cause some problems for those wishing to interpret it. The judge or arbitrator must yield to the intentions of the States in the dispute because they are concerned with achieving a concrete settlement acceptable to the parties, and will aim to settle the dispute according to the approach desired by them: thus certain questions that could have been examined may be avoided.

Finally and most importantly, difficulties arise where there exist conflicting precedents, as sometimes occurs.

(p. 41) 2 The ILC's use of case law in codifying the law on international responsibility

The use to which case law is put is inevitably influenced by the purpose of the codification project. The question is whether the text proposed constitutes a codification in the strict sense or whether it contains any significant progressive development of the law. Of course, in this respect the international case law

will not have the same significance in the case of liability for harmful consequences of activities not prohibited by international law as it has for responsibility for unlawful conduct.

One may also note a somewhat limited use of the 'classic' case law in some of the previous codification projects, especially that of García Amador in the 1950s, which was based on a 'progressive' vision of the 'codification' project.[6]

There is another factor that affects the role of case law: the concern of protecting the interests of developing countries has led certain participants in the codification project to prefer the 'development' of the law over simple codification. At the same time they tend to neglect the relevance of certain sources, such as domestic case law and even some of the international case law (to the extent it is deemed incoherent).[7]

(a) Formal references to the international case law in the ILC project

An examination of the commentaries to the 2001 Articles allows the drawing of several conclusions.

First, international case law seems to have been systematically invoked by all the Special Rapporteurs: the commentaries to nearly all the articles contain one or more references to the case law. The only exceptions are articles 18 (coercion), 19, 28, 46 (plurality of injured States), 53 (termination of countermeasures), 54 (measures taken by States other than an injured State), 56 (questions not regulated by the Articles). In this regard, it is true that the work of the Special Rapporteurs was guided only to a limited extent by the content of the compilations produced by the Secretariat, especially in the initial phases.

The Articles are based principally on case law precedents, to a far greater extent than on State practice and doctrine, references to which are far less systematic. The explanation may be a formal one: it simply corresponds to the concern for coherence and transparency. An explanation can also be found in the respect for a certain legal tradition, given that the Anglo-Saxon system accords more importance to case law (through the theory of precedent) than continental European doctrine. Another partial justification could be a certain tactical concern, namely that of being able to convince States more easily of the 'established' character of the solutions proposed by the ILC. Judicial or arbitral precedent may be regarded as more politically neutral than inter-State practice, more precise than customary rules, and more authentic than doctrinal assertions. A certain tendency not to give too much importance to certain elements of the practice, arbitral or diplomatic, seems to be emerging. This may be either because of its age or because of the difficulty of isolating judicial considerations from those relating to politics when analysing the precedent.[8]

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(p. 42) In short, the references to case law in the commentaries are relatively few in number and not particularly diverse, given the existing body of case law. Several explanations can be put forward:

- a considerable amount of the case law is judged to be irrelevant: if for example the hypothesis of individual rights is rejected, this leads to neglecting some parts of the case law that are concerned with the protection of human rights. Moreover, if 'primary' obligations are only referred to implicitly in order to concentrate on the conditions for incurring responsibility (the so-called 'secondary' obligations), this necessarily excludes an important part of the established case law;
- as a result of the suppletive character of most of the articles, the most relevant judicial precedents are the ones not dependent on particular treaty settlements. This excludes reference to numerous arbitrations that are too specific. This last point may also explain an implicit hierarchy in the references to case law (between arbitral tribunals and courts; between general and specialized courts; and between universal and regional bodies);
- last but not least, economy of means is a relevant principle in this area. Even Ago proceeded on the basis that '[r]eference will therefore be made to the most important cases which have arisen in diplomatic practice and international jurisprudence'. [9]

Is there an implicit hierarchy in the case law? This question must be approached carefully, since proving the existence of such a hierarchy is difficult. In fact, the commentaries rely on the case law in varying degrees:

- in some instances, reliance is placed on the case law simply for the purpose of showing the acceptance of some theory of responsibility. In such a case it is difficult to see more in this than a reliance on the 'practice', one that is very similar to diplomatic practice;
- at other times, such reliance concerns the positive foundation for a substantive rule. In such a case the precedent is sometimes merely presented as an illustration of the rule, while elsewhere the precedent will be given the status of proof of its existence;
- exceptionally, a rule or concept will be recognized simply by virtue of the fact that it has been relied upon by arbitral tribunals or courts: in this spirit, the last Special Rapporteur expressed great reluctance that a notion such as 'satisfaction', which had been accepted in both in the doctrine and in the case law, should be deleted from the draft. [10] The most remarkable illustration of this can be found in the development of article 30(b) (assurances and guarantees of non-repetition), consideration of which was suspended pending the decision of the International Court in the *LaGrand* case and retained having regard to the Court's judgment. [11]

On the other hand, intellectual honesty and political necessity require the Special Rapporteurs to point out potential differences in opinion as far as the scope for recognizing a certain precedent goes, for example in connection with the rules on compensation, or in relation to the scope of the *Klöckner* case.[12] The substantive disagreement

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(p. 43) between the members of the ILC suggests that such rules should be formulated flexibly. In these situations, further arguments must be presented in order to tip the balance one way or the other, and to explain the wording of an article that has been kept. But it seems that overall a large margin of appreciation is given to the Special Rapporteurs concerning the scope of a given precedent. Thus, in the absence of clear case law that distinguishes between crime and delict, an indirect interpretation would be possible.[13] Such an interpretation could be based on implicit reasoning imputed to judges and arbitrators.

(b) The scope of the case law used

As a matter of logic, the precedents that are most referred to are those that deal with continuing breaches. In order of the number of references, the cases are:

- *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*; [14]
- *Rainbow Warrior (New Zealand/France)*; [15]
- *Corfu Channel*; [16]
- *LaGrand (Germany v United States of America)*; [17]
- *United States Diplomatic and Consular Staff in Tehran*; [18]
- *Factory at Chorzów*; [19]
- *The SS 'Wimbledon'*; [20]
- *Certain Phosphate Lands in Nauru (Naura v Australia)*; [21] and,
- *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*. [22]

Apart from the 'classic' precedents dating back to the PCIJ and the early work of the ICJ, other more recent precedents have become 'classic' in their turn. Here, we will discuss the importance accorded to the *Gabcíkovo-Nagymaros Project* and *Rainbow Warrior* in the commentaries:

- confirmation of the fundamental principle of State responsibility for all wrongful acts and the constituent elements for such an act (articles 1 and 2);
- determination of the conditions for the existence of an international obligation and the distinction between immediate and continuing breach (articles 12 and 14);
- the recognition of circumstances precluding wrongfulness, especially countermeasures, *force majeure*, distress and necessity (articles 22, 23, 24, and 25);

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(p. 44) • confirmation of the fundamental principles that the State is required to respect its primary obligations and to put an end to their breach whatever the consequence may be in terms of incurring responsibility (articles 29 and 30);

• confirmation of the 'secondary' obligation to make full reparation for the injury caused by the wrongful act (article 31) and especially the obligation to compensate (article 36) or to provide satisfaction in default of restitution or compensation (article 37);

• finally, and only in relation to the judgment in the *Gabcíkovo-Nagymaros Project*, a confirmation of the conditions for the lawfulness of countermeasures, as concern the principle of proportionality and the procedural conditions for their implementation (articles 49, 50, and 51).

3 Conclusion

The position accorded to the international case law in support of the ILC's Articles on State Responsibility reflects its essential role in constructing this area of international law: its familiarity through recurring reference strengthens its educational effect in inter national relations. Although a certain preference for the case law of the 'universal' institutions is apparent, and in particular for the most recent decisions, it remains the case that the Articles constitute a consecration of State responsibility as developed through the historical case law, including some much older cases.

The two conditions for the emergence of a true law of responsibility, that is, an obligation to submit to third party settlement of disputes, and the required density of primary obligations, are yet to be met. The completion of the ILC's work in the area of diplomatic protection in 2006 greatly assists in that latter regard, although the completion of its work on the topic of liability for harmful consequences of acts not prohibited by international law, also completed in 2006, is of far lesser impact. However, the non-fulfilment of those two conditions is simply an echo of the structure of the international system, which may still largely be characterized as an inter-State society.

Further reading

I Brownlie, *System of the Law of Nations: State Responsibility* (Oxford, Clarendon Press, 1983)
P-M Juret, 'Observations sur la motivation des décisions juridictionnelles internationale' (1960) 64 *RGDIP* 516–595
H La Fontaine, *Pasicrisie internationale. Histoire documentaire des arbitrages internationaux (1794–1900)* (Stampfli, Berne, 1902)
P Reuter, *La responsabilité internationale—Problèmes choisis* (Cujas, Paris, 1956)
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Footnotes:

1 R Ago, Third Report on State Responsibility, *ILC Yearbook 1971*, Vol II(1), 199, 207 (para 34) .

2 The decision in *Factory at Chorzów*, *Merits, 1928, PCIJ, Series A, No 17* is an essential precedent in this regard.

3 *Trail Smelter (United States of America/Canada)*, 16 April 1938 and 11 March 1941, 3 *RIAA* 1905.

4 *Lac Lanoux (Spain, France)*, 16 November 1957, 12 *RIAA* 281, 285.

5 *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v Uganda), ICJ Reports 2005*, p 1, 75–79 (paras 237–250).

6 See the description in the first report: R Ago, First Report on State Responsibility, *ILC Yearbook 1969*, Vol II(1), 132–136 (paras 41–71) .

7 See eg the discussion concerning reparation 'by equivalent', in Report of the ILC, 42nd Session, *ILC Yearbook 1990*, Vol II(2), 71–77 (paras 344–377) .

8 Ibid, 69–71 (paras 337–341) .

9 R Ago, Second Report on State Responsibility, *ILC Yearbook 1970*, Vol II, 177, 179 (para 10) .

10 Report of the ILC, 52nd Session *ILC Yearbook 2000*, Vol II(2), 35–36 (paras 154–160) .

11 *LaGrand (Germany v United States of America), Judgment, ICJ Reports 2001*, p 466.

12 *Klöckner Industrie-Anlagen GmbH, Klöckner Belge SA and Klöckner Handelsmaatschappij BV v Republic of Cameroon and Société Camerounaise des Engrais SA* (ICSID Case No ARB/81/2), Award, 21 October 1983, 2 *ICSID Reports* 3; Award (resubmitted case), 26 January 1988, 14 *ICSID Reports* 3.

13 See R Ago, Third Report on State Responsibility, *ILC Yearbook 1971*, Vol II(1), 199, 224–226 (paras 76–85) .

14 *Gabcíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7.

15 *Rainbow Warrior (France/New Zealand)*, 30 April 1990, 20 *RIAA* 215, 217.

16 *Corfu Channel, Merits, ICJ Reports 1949*, p 4.

17 *LaGrand (Germany v United States of America), Provisional Measures, ICJ Reports 1999*, p 9 and *Merits, ICJ Reports 2001*, p 466.

18 *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran), Judgment, ICJ Reports 1980*, p 3.

19 *Factory at Chorzów (Germany/Poland), Jurisdiction, 1927, PCIJ, Series A, No 9*; and *Merits, 1928, PCIJ, Series A, No 17.*

20 *The SS 'Wimbledon' (France/Germany), 1923, PCIJ, Series A, No 1*, p 15.

21 *Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections, ICJ Reports 1992*, p 240.

22 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, ICJ Reports 1986*, p 14.
