Oxford Public International Law

Part II International Responsibility—Development and Relation with Other Laws, Ch.12 Responsibility and the United Nations Charter

Vera Gowland-Debbas

From: The Law of International Responsibility
Edited By: James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (Assistant)

Content type: Book content
Series: Oxford Commentaries on International Law
ISBN: 9780199296972

Product: Oxford Scholarly Authorities on International Law [OSAIL]
Published in print: 20 May 2010

Subject(s):

Responsibility of states — Wrongful acts — Self-defence — Responsibility of individuals — UN Charter — Vienna Convention on the Law of Treaties — Customary international law — Lex specialis — International peace and security — Collective security

(p. 115) Chapter 12 Responsibility and the United Nations Charter

1 Introduction

This Chapter examines the relationship between the United Nations Charter and the customary law regime of State responsibility as codified in the ILC's Articles of 2001. It does not cover questions arising from the responsibility of international organizations in their own right as international legal persons, nor, or at least not directly, those related to the concurrent responsibility of any State for the conduct of an international organization. These issues are excluded from the scope of the Articles.

References

(p. 116) The relationship between the Charter and the ILC Articles can be examined from the perspective of the rules governing the relationship between two distinct sources of international law, the conventional Charter regime and the customary rules of responsibility; from that of the relationship between the mainly primary rules of the Charter and the secondary rules of responsibility; and from that of the relationship between the *lex specialis* of the Charter, containing its own subset of secondary rules, and the general, residual rules of the Articles.[1]

An important additional dimension, reflected in article 59 of the Articles, is the hierarchical superiority of the UN Charter, flowing from its constitutional character, from its universal membership, as well as from article 103.[2] The degree to which this hierarchy operates in relation to customary, as opposed to conventional, international law has been debated. But the law on State responsibility has also been considered to contain foundational rules for international society which are transversal, cutting across different fields of international law, so that we are faced with a potential clash between two sets of rules both of which may be considered constitutional, although in different senses.

Finally, from the perspective of the respective functions of the two regimes within the international legal system as a whole, the articulation between State responsibility and the collective security system incorporated into Chapter VII of the UN Charter is particularly pertinent in the light of the development of an international public policy (*ordre public*). Though these functions are distinct—the one concerned with the legal consequences of internationally wrongful acts, the other with the political function of maintaining and restoring international peace and security—recent developments in each of these regimes have led to areas of potential convergence and conflict.

The ILC's codification of State responsibility was, at an early stage, re-oriented away from its narrow focus on the responsibility of the State for injuries to aliens, and came to adopt a broad vision embracing both reparation and sanctions, which reflects the modern notion of community interests. Initially, this took the form of the concept of 'international crimes' incorporated in former article 19 of Part One of the draft Articles. The deletion of this article, and hence the removal of the distinction between delicts and crimes for the purposes of Part One, has nevertheless not resulted in the abandonment of a hierarchy of norms. This has been retained in two overlapping although not identical ways: the notion of serious breaches of obligations under peremptory norms of international law (article 40) and that of obligations owed to the international community as a whole (article 48, on the invocation of responsibility). The Articles thus continue to reflect the principle that there are certain consequences flowing from these concepts within the field of State responsibility. At the same time, as will be shown, the practice of the Security Council under Chapter VII of the Charter may increasingly be viewed as a form of collective response to violations of fundamental community norms considered to threaten the maintenance of international peace and security, thereby raising important issues of State responsibility. In short, both the law of collective security—at least in practice—and the law of State responsibility now provide for legal consequences as the result of violations of such fundamental norms.

References

(p. 117) The current debate therefore no longer relates to the existence of such norms, but to the consequences of their breach and, in particular, whether reactions to such breaches should take place within a unilateral or institutional framework, the latter particularly within the framework of the collective security system of the Charter.

The ILC's approach to the relationship between State responsibility and collective security has evolved, from efforts to entrench Charter organs and mechanisms into the framework of State responsibility, to the exclusion of the UN Charter from the scope of the Articles altogether by means of a saving clause in article 59. Nevertheless, even if one upholds the view that State responsibility and collective security are distinct regimes, the question of their coexistence or coordination arises.

The following sections examine the relationship between the UN Charter and the Articles on State responsibility, first within the framework of the Articles: looking at the place of the UN Charter within these rules, the extent to which State responsibility should be subordinated to collective security, and the points of intersection between the two; second, within the Charter framework, raising the question of whether its collective security system may be seen as providing for a special regime of responsibility for particularly serious wrongful acts, and the degree to which the general rules of State responsibility may be said to continue to apply when States act within the framework of international organizations and in pursuit of the decisions and objectives of the organization.

2 The Articles on State Responsibility and the UN Charter

(a) The safeguard clause of article 59

Article 59 of the Articles states: 'These articles are without prejudice to the Charter of the United Nations.' The Articles have a general and residual character; they therefore do not exclude the existence and further development of legal consequences of internationally wrongful conduct outside their framework,[3] for example, as within the framework of the Charter.

Article 59 is situated in Part Four which contains general provisions specifying the scope of the Articles. It covers the Articles as a whole. The UN Charter is distinguished from the concept of *lex specialis* (including so-called self-contained regimes) in article 55, which constitutes a saving clause in favour of sub-systems which may contain their own secondary rules, recognizing that these prevail over the Articles but only where they have the same subject-matter and only to the extent of any inconsistency. Article 55 is concerned with special rules having the same legal rank as those expressed in the Articles, whereas the special hierarchical relationship of the UN Charter required a separate saving clause.

To understand the provisions of article 59 and the reasons for its adoption, it is necessary first to trace the long-standing debate in the ILC regarding the place to be accorded the UN Charter in the Articles. Beginning in 1976, this discussion took place mainly in the context of the debate over a differentiated regime for State responsibility arising from the distinction between delicts and crimes. Initially, under Roberto Ago, and then under Willem Riphagen, an attempt was made to entrench existing UN provisions and procedures relating to the maintenance of international peace and security in the draft Articles, as a form of organized reaction to international crimes, thus subordinating State reactions to them. A second approach, instigated by Special Rapporteur Gaetano Arangio-Ruiz, attempted to

References

(p. 118) enlist Charter organs in new procedures for the determination of international crimes and the consequences that should follow as a matter of the application of the law of international responsibility, rather than under the law relating to the maintenance of international peace and security. The Articles in their final form have chosen a third track, which is to consider the Charter's collective security measures as wholly excluded from their scope, viewing these either as a separate but complementary regime of responsibility, or as a distinct regime of collective security existing in parallel with the Articles. It should be noted that while the initial discussions took place against the backdrop of paralysis of the Security Council, the debate took another turn in 1990 in light of the Council's renewed activism, with concern over the broad scope of its powers taking central stage.

(i) Antecedents of article 59: the enlisting of Charter mechanisms

Willem Riphagen had first proposed to deal with the relationship between the UN Charter and the draft Articles as follows:

> The performance of the obligations entailed for a State by its internationally wrongful act, and the exercise of the rights for other States entailed by such act, are subject to the provisions and procedures embodied in the Charter of the United Nations.

In revised form, this became draft article 5 in 1983 (renumbered draft article 4 in 1985), and was adopted on first reading as draft article 39 in 1996.[4]

Draft article 39, which was placed in the chapeau to Part Two of the draft Articles, read as follows:

> The legal consequences of an internationally wrongful act of a State set out in the provisions of this Part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

This stipulation engendered much discussion and misgivings both before and after its adoption.[5]

Draft article 39 appeared to stop short of article 103 of the Charter, regulating only the relationship between the law of State responsibility and the law of collective security. However, it also went beyond article 103 in covering also the customary rules of State responsibility, as well as having effects on Part One of the draft Articles, hence on provisions, *inter alia*, relating to the existence and attribution of the wrongful act, circumstances precluding wrongfulness, such as countermeasures, and self-defence, as well as the determination of aggression. Thus in fact, it would have subordinated the draft Articles as a whole to the Charter.[6]

Hence the concern of the Special Rapporteur, Arangio-Ruiz, that this provision, in particular in light of the phrase 'subject, as appropriate, to the provisions and procedures of the UN Charter …', would affect the distinction between the customary law of State (p. 119) responsibility and the law of collective security, subjecting the former to the powers of a political organ, thus 'bring[ing] about a dramatic extension of the Security Council's influence in a vital area of conventional and customary international law.'[7] This was particularly problematic in view of the fact that the relationship between the Charter and customary international law was not clarified.

The relationship of the UN Charter to the Articles was also discussed in connection with 'international crimes'. Former draft article 19 was viewed as the logical outcome of a process in legal thinking which had also been given expression by the Charter's special regime instituted in Chapter VII.[8] In consequence, Charter mechanisms were linked into the Articles as additional consequences of international crimes, although it was recognized that the draft Articles could neither qualify nor derogate from the provisions of the Charter relating to the maintenance of international peace and security.[9]

In 1984, at the instigation of Willem Riphagen, draft article 14 was introduced, stipulating that the exercise of rights and obligations flowing for all States would be 'subject, *mutatis mutandis*, to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security' and expressly referring to article 103 of the Charter.[10] Unlike draft article 39, which conditioned States' reactions to internationally wrongful acts to Charter mechanisms, draft article 14(3) had a different function. It sought to enlist the Security Council as regards responses not implying the use of force even for those crimes falling outside the framework of Chapter VII, for it was pointed out that not all international crimes necessarily affected the maintenance of international peace and security. The jurisdiction of the United Nations, representing the organized international community, over such a situation was therefore considered to be one of four sets of legal consequences common to all international crimes.[11]

Draft article 15 also stated:

> An act of aggression entails all the legal consequences of an international crime and, in addition, such rights and obligations as are provided for in or by virtue of the United Nations Charter.

This was an implicit *renvoi* to the collective security mechanisms.[12] Since neither draft articles 14 or 15 were finally retained in the 1996 text, draft article 39 came to condition States' reactions to all internationally wrongful acts, including international crimes.[13]

In 1995 and 1996, the Commission also rejected as inappropriate the detailed procedures regarding international crimes outlined *de lege ferenda* by Gaetano Arangio-Ruiz, which postulated a role for United Nations organs—the General Assembly, Security Council and International Court of Justice—in an eventual convention on State responsibility, outside of the Charter.[14] In this scheme, the General Assembly or Security Council would have decided (p. 120) whether States could bring to the attention of the Court an allegation of an international crime, a positive finding leading to a procedure involving compulsory jurisdiction in which the Court would determine with authoritative effect the existence of an international State crime and to which State it was to be attributed, as well as the special consequences which would follow.

Finally, the question was raised in 1998 whether the Articles should cover the legal consequences of international crimes at all. Indeed, part of the reasons for dropping the development of a distinct regime of responsibility for international crimes altogether and deleting draft article 19 was the recognition that whereas, on the one hand, the draft Articles could not modify or condition the provisions of the Charter, on the other, action under the Charter could be taken in response to any international crime, seeing that such an act could fall within one or other of the situations envisaged in article 39 of the Charter.[15]

This policy choice, which departed from the previous approach by the Commission, meant that references to the provisions of the Charter relating to peace maintenance were excised from the Articles. Nevertheless, while the formulation of article 39 and its position in the draft Articles were questioned, the principle underlying article 39 was generally supported by Governments and led to its substitution by the current article 59.[16]

(ii) Article 59: the exclusion of Charter mechanisms from the scope of the Articles

In contrast to former draft article 39, the new saving clause relates to the whole of the Articles and therefore concerns the relationship between the law of State responsibility and the Charter as a whole. Article 59 'provides that the Articles cannot affect and are without prejudice to the Charter of the United Nations' and that they 'are in all respects to be interpreted in conformity with the Charter'.[17] The phrase 'without prejudice' reflects the reality that the rules of State responsibility cannot interfere with the Charter, including the Security Council's action in the field of peace maintenance. Article 59 therefore states the obvious: the Articles cannot change or alter any obligations that States have under the Charter or affect the competence of its organs, and in case of conflict between the two instruments, a priority is established. This of course is an acknowledgement of the hierarchical ranking of the Charter, as reflected in Charter article 103 and recognized in the 1969 Vienna Convention on the Law of Treaties.

Other provisions in the Commentaries also indicate that article 59 should be read as meaning that the Articles cease to apply when States are implementing institutional decisions. It is stated clearly, with particular reference to UN action, which is reserved by article 59, that the Articles do not cover 'such indirect or additional consequences as may flow from the responses of international organizations to such wrongful conduct', because these are determined within the framework of the constituent instrument.[18] This is corroborated by the Commentary to article 54 which clearly deals only with individual measures by non-injured States, whether taken by one State or a group of States, as opposed to institutional reactions in the framework of international organizations:

> References
>
> (p. 121) The latter situation, for example where it occurs under the authority of Chapter VII of the United Nations Charter, is not covered by the Articles. More generally the Articles do not cover the case where action is taken by an international organization, even though the member States may direct or control its conduct.[19]

Moreover, the Commentary to article 40 states that it is not the function of the Articles to establish new institutional procedures for dealing with serious breaches of peremptory norms and recognizes that the latter are likely to be addressed by the competent international organizations including the Security Council and the General Assembly.[20]

But to what extent does article 59 reflect the existing situation in international law? Unarguably, in case of conflict, the Charter, including the decisions of the Security Council would override (though not invalidate) an eventual convention on State responsibility. In this sense, therefore, the origins of an obligation in the Charter would have important effects on international responsibility.[21] But some have pointed out that in such a situation, article 59 would be superfluous.[22]

If, however, the Articles remain in their non-conventional form, then article 59 goes beyond article 103 of the Charter which relates only to inconsistent treaty obligations, by having the effect of subordinating to the Charter the customary law on State responsibility, including its progressive development, *by virtue of the Articles themselves*. There is of course no doubt, as the discussions over former draft article 39 had underlined, that these customary rules are affected by the UN Charter, for example, the latter's dispute settlement provisions and rules regulating the use of force. In any event, the Charter is now quasi-universal and these provisions are recognized as forming part of customary law. The Commentary to article 59 also states instances in which the derivative obligations contained, for example, in Security Council decisions, could affect issues dealt with in the Articles, such as the Security Council's characterization of State conduct as unlawful (the *Lockerbie* case is given as a specific example), or where it deals dealing with matters of compensation (for example, the case of Iraq).[23]

But in this case, surely, article 59 does not go beyond the *lex specialis* rule endorsed by article 55. For, unless one adheres to the view that article 103 reflects the *jus cogens* character of the Charter as a whole, the pre-eminence of Charter over customary law—despite its undoubted constitutional traits—stems more from the application of the rules relating to the relationship between treaty and custom than from the hierarchical nature of the Charter. It is a well established fact that parties to a treaty can derogate or contract out from the customary law rules at least in their relations *inter se*, and so long as that derogation is express and does not run counter to a peremptory norm of international law.

At the same time, the International Court of Justice has also stated that rules of customary law retain a separate or parallel existence even if they are identical to conventional obligations and even as between the treaty parties. As a result, they affect such conventional obligations to the extent that they supplement or

can be used as interpretative tools for these rules. In the Advisory Opinion concerning the *Legality of the Threat or Use of Nuclear*

References

(p. 122) Weapons, the Court did indeed affirm that the customary law dual conditions of necessity and proportionality applied to article 51 of the UN Charter.[24]

One could therefore understand article 59 to mean that the customary law rules on State responsibility continue to apply to States in carrying out their Charter obligations to the extent that there is no express derogation from them and that they otherwise do not affect State obligations under the Charter. Moreover, existing in parallel they can supplement or serve as interpretative tools for Charter obligations. This is particularly important in an area where two sets of constitutional rules (taken in different senses) interplay.

Nevertheless, the relationship between the customary rules on State responsibility codifi ed in the Articles and the conventional obligations of the Charter remains unclear. It is difficult to determine whether the formulation in article 59 is an improvement on the previous draft article 39 and to what extent it acts as a safeguard to ensure that the rules on responsibility 'would not be subject as appropriate to derogation by arbitrary, *ultra vires* decisions of a political body'.[25]

Article 59 thus appears to raise the same queries as former article 39. The commentary to the latter had shown the tug of war between upholding the overriding interests of the entire community of States in preserving international peace and security and the concerns of many members of the Commission:

> that a State's rights or obligations under the convention that is based on the law of state responsibility— could be overridden by decisions of the Security Council under chapter VII … Would the Security Council be able to deny a State's plea of necessity (article 33), or countermeasures (47 and 48) or impose an obligation to arbitrate? The Security Council could not as a general rule deprive a state of its legal rights or impose obligations beyond those arising from general international law and the Charter itself. Exceptionally it could call on a State to suspend the exercise of its legal rights …[26]

That the Articles themselves have not succeeded in entirely excluding the UN Charter from their scope is evident from certain points of intersection between them. While, on the one hand, it is clearly recognized that the Articles are residual, and can be complemented or derogated from by other rules, on the other hand, it cannot be said that the UN Charter is a self-contained regime, thus excluding the application of the entire law of State responsibility. The existence of a safeguard clause in article 59 cannot mean therefore that there is no interplay between the two instruments.

(b) The Articles on State Responsibility and breaches of Charter obligations

(i) The elements of an internationally wrongful act and breaches of Charter obligations

The rules set out in Part One of the Articles on State Responsibility may apply to a breach of a Charter obligation. Part One lays down a single general regime of State responsibility (p. 123) and is not concerned with distinctions between categories of obligations.[27] Article 12 which provides that the breach by a State of any international obligation, regardless of origin or character, gives rise to responsibility under general international law, therefore also covers the treaty obligations of the UN Charter.[28] This means that the general conditions of article 2 regarding establishment of a breach and attribution also apply as residual rules to breaches of Charter obligations.

Responsibility could also arise under article 16 of the Articles from the aid or assistance given by one State to another in the commission of an act in breach of Charter obligations, for example in order to circumvent sanctions decided by the UN Security Council or to commit human rights violations.[29]

As to the circumstances precluding wrongfulness detailed in Part One, Chapter V, these seem now to have less relevance in the context of the relationship between Articles on State Responsibility and UN Charter. The Commentary to Article 21 states that:

> a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph (4)[30]

but refers back to the applicable primary rules in the Charter. The former draft article 30 on countermeasures had indeed covered institutionalized reactions to violations of international obligations, but the current article 22 is now clearly limited to nonforcible reprisals.[31] Finally, whether a State's plea for exoneration from the implementation of a Security Council decision under article 25 of the Charter, for example on grounds of economic hardship, would meet the requisite conditions laid down in articles 23 and 25 of the Articles is a moot question, since it appears that only the Security Council, under article 48(1) of the Charter, has discretionary competence to dispense particular States from such implementation, the only recourse otherwise being article 50 of the Charter.

(ii) Relevance of the Articles to the legal consequences of a breach of Charter obligations

While the UN Charter does include certain secondary rules relating to consequences of breaches of Charter obligations,[32] it does not entirely address breaches of its provisions.

Article 41 of the Articles imposes certain duties on States in respect of cooperation, non-recognition, and non-assistance in response to serious breaches of peremptory norms, many of which are firmly embedded in the purposes and principles of the UN Charter, for example, self determination, the prohibition of the use of force, and certain human rights obligations, such as the principle of non-discrimination. Article 41 recognizes that

References

(p. 124) the special duties of States may be carried out both within and outside of the framework of international institutions.[33] The practice of the Security Council as well as that of the General Assembly is also taken into account, for example in the field of nonrecognition.

Yet the duties stipulated in article 41 are minimal and the Commentary recognizes that:

> the serious breaches dealt with in this Chapter are likely to be addressed by the competent international organizations including the Security Council and the General Assembly

and, in particular, that:

> [i]n the case of aggression, the Security Council is given a specific role by the Charter.[34]

The ILC had thus implicitly supported the former draft article 15 introduced by Willem Riphagen in 1982 which had dealt with the consequences of an act of aggression. This does not mean, however, that certain consequences of aggression not expressly dealt with in the Charter, for example reparations, could not be regulated by the Articles on State responsibility.

The relationship between article 59—more specifically as regards Security Council enforcement action—and article 54 has also been raised. Would article 59 have, for example, the effect of subordinating to Chapter VII of the Charter, the 'lawful measures' taken by States other than the injured State faced with the breach of an obligation owed to the international community as a whole? In short, should the Charter have exclusive monopoly over such measures or should countermeasures by third States be allowed outside its framework, and if so, under what conditions?[35] This has been the subject of some debate within the ILC, with the question of the Security Council's exclusive role only emerging in 1982–1983 when the ILC adopted the forerunner of draft article 39.[36] Roberto Ago had stated as early as 1979:

> It is understandable, therefore, that a community such as the international community, in seeking a more structured organization, even if only an incipient 'institutionalization', should have turned in another direction, namely toward a system vesting in international institutions other than States the exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and thereafter, for deciding what measures should be taken in response and how they should be implemented.[37]

The question will not be dealt with here, since article 54 is discussed elsewhere in this volume.[38]

References

(p. 125) 3 The Charter provisions for peace maintenance: a special regime of responsibility?

(a) The ILC's approach to the Charter regime

(i) The ILC debate over collective measures as a form of responsibility

The question whether the UN Charter provided for a special regime of responsibility applicable to breaches of obligations safeguarding the fundamental interests of the international community was raised in connection with international crimes. In tracing the evolution of legal thinking on this concept, Special Rapporteur Roberto Ago had pointed out that the UN Charter, including the collective measures provided for under Chapter VII relating to threats to the peace, breaches of the peace and acts of aggression, attached specific consequences to particularly serious breaches of fundamental obligations, and had underlined the practice of the Security Council (and General Assembly) in reacting to breaches of fundamental norms.[39]

There were, however, objections to viewing Chapter VII measures as forms of State responsibility. First, these measures could be taken even against a State which had not acted in violation of international law. Second, the object and purpose of the measures decided upon by the Security Council was not to preserve the law but to maintain or restore international peace and security. Third, even if taken as a consequence against a wrongful act, these measures were coercive, not punitive, their objective being to achieve cessation of the wrongful act. Fourth, the Security Council, which reserves a privileged position to the permanent members, was a political and not judicial organ and consequently determinations made under article 39 were not legal determinations; hence it was inappropriate to entrust it with the task of applying legal sanctions. A clear distinction therefore had to be made between the law of State responsibility and the maintenance of international peace and security.[40]

(ii) Sanctions in the framework of State responsibility

Despite objections to treating the UN's collective security mechanisms as a form of State responsibility, two developments within the framework of the ILC reinforce this position.

First, it is recognized that sanctions are now an integral part of the law of State Responsibility. In defining the scope of the latter, the Articles have compromised between the views of Anzilotti and Kelsen, by adopting a third approach propounded by Roberto Ago:

> that the consequences of an internationally wrongful act cannot be limited either to reparation or to a 'sanction'. In international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances.[41]

Secondly, the ILC has endorsed the trend in modern international law to reserve the term 'sanction' for:

References

> (p. 126) reactive measures applied by virtue of a decision taken by an international organization following a breach of an international obligation having serious consequences for the international community as a whole, and in particular for certain measures which the United Nations is empowered to adopt, under the system established by the Charter, with a view to the maintenance of international peace and security.[42]

Sanctions in this sense, unlike the current term countermeasures, include therefore the use of armed force. While this definition of sanctions is of recent origin, it has traditionally been held that true legal sanctions are non-existent in the absence of a centralized system.[43]

(b) Collective security and State responsibility

(i) Chapter VII mechanisms as sanctions

In the past, only Articles 5, 6, and 19 of the Charter were considered to provide pure forms of sanctions in the Charter.[44] The link between Charter mechanisms for peace maintenance and the concept of legal sanction may therefore appear to be tenuous.

The system instituted by the League of Nations under article 16(l) and (2) of the Covenant had marked a radical departure in international law by sanctioning infringements of the specific obligation of Member States not to have recourse to war except under the conditions specified in the Covenant in articles 12, 13, and 15 (although a French proposal suggesting the extension of the collective guarantee to cover *all violations* of international law had not been retained[45]). Chapter VII measures, however, were not intended to be limited in their application to cases of non-compliance with pre-existing obligations, though they went further than those instituted by the League in being both mandatory, centralized, and collective.[46]

There has been some support in the doctrine for viewing the mandatory measures under Chapter VII as legal sanctions in the sense of requiring the prior violation of an international obligation. Hans Kelsen had stated that the purpose of enforcement action 'is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law'.[47] Yet he advanced an alternative theory, considering that, since a forcible interference in the sphere of interests of a State—the case in respect of articles 41

References

(p. 127) and 42—could only be permitted as a reaction against a violation of the law, then such a measure would have to be interpreted as a sanction if the Charter were to be deemed in conformity with international law. In that case any conduct to which the Council is authorized to react with enforcement action has to have the character of illegal conduct, in other words one could interpret the Charter as imposing an obligation on States not to threaten or breach the peace (aggression being in any case outlawed).[48]

Others, however, have held that such measures only constitute police measures for the preservation and restoration of the peace.[49] Thus Arangio-Ruiz considered that:

> No provision can be found in the Charter indicating that such a peace-enforcement power includes any competence to determine, declare or enforce international rights or obligations, or for that matter, any competence to apply sanctions …[50]

Again:

> Although such measures may well perform—as they frequently do—the *practical function* of a sanction (for the violation, for example, of … provisions of the UN Charter or of other treaty or customary rules) they cannot be regarded as sanctions in a proper, legal sense.[51]

Such assertions for and against consideration of Chapter VII measures as legal sanctions revolve around whether there is a prior requirement for action by the Security Council for a violation of a Charter obligation. Enforcement measures provided for under articles 39, 41, and 42 of the Charter, were, however, clearly not intended as a response to the violation of a pre-existing obligation in the Charter. The Council was deliberately given wide discretionary powers in making its preliminary finding under article 39, a prerequisite for the application of Chapter VII measures, for a threat to the peace or breach of the peace, or act of aggression, is nowhere defined (even the Definition of Aggression contained in GA Res 3314(XXIX) is stated as not intended to prejudice or hamper the wide discretion which the Council has in the matter) and clearly goes beyond the scope of article 2(4) of the Charter. Moreover, the Charter does not explicitly require the Security Council to match the gravity of the situation—threat to the peace, breach of the peace, or act of aggression—to a rising scale of severity of the response, since the Council is given a discretionary choice between making recommendations under article 39, calling for provisional measures under article 40 or adopting mandatory non-forcible or military measures under articles 41 and 42. The conclusion therefore can only be that this determination entails a factual and political judgement, which is the outcome of political considerations, not legal reasoning.

The practice of the Security Council, however, has shown the applicability of the concept of sanctions in the framework of Chapter VII as well as the permutations to which the concept of sanctions itself can be subjected in terms of its content and purpose. Though the Council is not required to react only to a violation of international law, its decisions in

References

(p. 128) numerous cases relating to international peace and security have undoubtedly functioned as collective responses to violations of fundamental norms of international law and have contained many of the legal elements comprising State responsibility. The question that has to be raised is the extent to which they may be analysed through the prism of the customary rules of State responsibility.

(ii) The practice of the Security Council and issues of State responsibility

The term 'sanctions' is now consistently used in conjunction with the enforcement powers of the Council under Chapter VII, including Security Council resolutions and the practice of member States.[52]

The mandatory measures adopted by the Security Council under article 41 have, in numerous cases, been based not only on a finding of fact but also on one of law. Determinations under article 39 of a threat to or breach of international peace and security (so far there have been no determinations of an act of aggression) have thus been linked to alleged breaches of international (and not only Charter) law, the violation becoming therefore a constituent element of the threat to or breach of the peace. Moreover, the Security Council has singled out serious breaches of those norms that are now considered to be fundamental to the international community, some of which were listed in former draft article 19 of the draft Articles. The practice of the Council has also raised issues of State responsibility such as attribution, circumstances precluding wrongfulness, and legal consequences such as cessation, sanctions not including the use of force, authorizations of unilateral uses of force, guarantees of non-repetition, and reparations.[53] It has also, in many cases, attributed these breaches to particular legal entities, whether States or non-State actors.

This practice may be traced to the first cases of Southern Rhodesia in 1966, in which the Council considered that the policies of racial segregation and the Unilateral Declaration of Independence by a white minority regime infringed the right to self-determination of the majority of the inhabitants of the territory, and of South Africa in 1977 in relation to its apartheid policies.[54] But this trend intensified after 1990, as the select examples from the practice, set out below, will show.

Thus, the Council's determination that the invasion and occupation of Kuwait was contrary to Iraq's obligations under the Charter was followed by a series of resolutions which referred to Iraq's additional violations of international law, ranging over human rights and humanitarian law, diplomatic immunities, environmental damage, and the depletion of natural resources.[55]

In relation to the conflict in the former Yugoslavia, the Security Council reaffirmed that any taking of territory by force was unlawful and unacceptable, and affirmed 'that any entities unilaterally declared or arrangements imposed in contravention thereof will not (p. 129) be accepted'. Council resolutions were also punctuated by condemnations of the massive and systematic violations of human rights and fundamental freedoms, including those of ethnic minorities, and of the grave breaches of international humanitarian law, including the practice of 'ethnic cleansing' and the deliberate impeding of deliveries of food and medical supplies to the civilian population). As for the conflict in Kosovo, although Council concern was triggered by the instability created in the region and the threat of intervention by neighbouring States—a major security concern—the link was also made between the threat to the peace and similar violations of fundamental principles of international law.[56]

In the Somalia, Rwandan, and Sudanese crises, which were all internal conflicts, the Council strongly condemned 'violations of international humanitarian law' and human rights. It also used the word genocide for the first time—in connection with the massacres in Rwanda (although not in the case of Darfur).[57] In the case of the mixed inter national/internal conflict in the Democratic Republic of the Congo, the Council not only deplored the persistence of violations of human rights and international humanitarian law, but referred to a whole range of other violations including the *jus ad bellum* and the depletion of natural resources, pointing the finger at Rwanda and Uganda, as well as at some of the rebel movements operating within the DRC and elements of the Congolese armed forces themselves.[58]

In connection with State-sponsored terrorism, in the case of Libya, the link was clearly made between that State's failure to renounce on international terrorism and threat to international peace and security.[59] After the attacks of 11 September 2001, the Council has clearly underlined that 'terrorism in all its forms and manifestations' constitute one of the most serious threats to international peace and security and has called on States to criminalize such acts in their domestic law.[60] There are numerous other examples in Security Council resolutions on the proliferation of nuclear weapons, though less clearly linked to State responsibility.[61]

Following the assassination of the former Lebanese Prime Minister Rafik Hariri, the Council, acting under Chapter VII, reaffirmed the link between 'terrorism in all its forms and manifestations' and serious threats to international peace and security and endorsed the conclusions of the report of the International Independent Investigating Commission that there was converging evidence pointing at both Lebanese and Syrian involvement in this assassination, which the Council defined as an act of terrorism.[62]

The Council has also attributed these breaches to particular legal entities, including non-State entities, such as UNITA in Angola, the Bosnian Serbs, the Taliban or Al-Quaeda, or the Janjaweed in the Sudan. In at least one case, that of the condemnation of ETA (p. 130) for the Madrid bombings, it was later established that that attribution had been made erroneously.[63]

Moreover, the measures which follow this qualification under article 39, despite their evident political origins, function as sanctions, in the sense that they deny all legal effects to the illegal acts of the entity against which they are applied, and also result in the forcible temporary suspension of its subjective legal rights.

Thus the Council has qualified the acts of States and non-State entities as illegal and invalid, quasi-judicial determinations which have 'operational design' in the sense of entailing definitive and far-reaching legal effects.[64] The Council has called for collective non-recognition of unilateral acts, including domestic acts, for refusal of municipal law benefits such as application of the laws or acts of the sanctioned entity in domestic courts, or the grant of immunity.[65]

The sanctioned State's trading relations have been severed under article 41 of the Charter—with the imposition of arms or petroleum embargoes, and other selective or comprehensive economic, financial and diplomatic measures. Its means of communication— by air, sea, or land—has been interrupted. The Council has authorized the seizure of its modes of transportation. States have also been called on to adopt financial measures against the targeted State.[66] The latter measures have become part of the Council's strategy in moving away from comprehensive sanctions with all its concomitant problems to so-called 'smart' or targeted sanctions: targeted against individuals, such as government leaders, elites and other specifically designated entities responsible for the policies or acts condemned; targeted against particular commodities or services, involving in particular restrictions on financial and banking operations (asset freezes, blocking of financial transactions or financial services) and travel and aviation bans (including visa restrictions); or directed against specific commodities, such as arms or diamonds.

The decisions of the UN Security Council requiring States to apply sanctions within the framework of Chapter VII of the Charter have had the effect of releasing Member States from pre-existing treaty obligations by virtue of the operation of article 103.[67] Security Council resolutions have also resulted in temporarily suspending the (non-imperative)

References

(p. 131) rules of customary international law. Member States have sought authorizations from the Security Council where they have deemed their actions contrary to international law,[68] for example before resorting to military force, where grounds of self-defence were obviously inapplicable. Thus, the Council has authorized the use of military force for limited purposes, such as naval interdictions at sea, or for wide-ranging purposes, such as protection of humanitarian assistance, enforcement of peace agreements, or to achieve withdrawal from occupied territory.[69] Both resort to article 103 of the Charter and authorizations to use military force outside the exceptions in the Charter embedded in Security Council resolutions, have therefore served a very important function, placing the action within the framework of the Charter and thus ensuring that States would not thereby incur international responsibility. This issue was raised in the ILC in passing in regard to whether resolutions not governed by article 25 of the Charter could operate as such a circumstance precluding wrongfulness. It was stated:

> sanctions applied in conformity with the provisions of the Charter would certainly not be wrongful in the legal system of the United Nations, even though they might conflict with other treaty obligations incumbent upon the State applying them … such measures are the 'legitimate' application of sanctions against a State which is found guilty within that system of certain specific wrongful acts. This view would, moreover, seem to be valid … [even] where the taking of such measures is merely recommended.[70]

While the primary purpose of Security Council measures adopted under Chapter VII is to restore international peace and security, where a wrongful act becomes a constituent part of the determination of the existence of a threat to the peace and, by definition, is an act having a continuing character (since it would not otherwise form part of an actual threat), it is evident that peace could not be restored without putting an end to the violation. Council resolutions have therefore included calls for cessation of the acts in question, such as withdrawal from occupied territory, an end to violations of human rights or humanitarian law, or the renunciation of terrorism.

The Council has also set conditions on States which in certain cases go beyond preexisting legal obligations, such as the submission of Iraq, under Resolution 687, to the destruction, removal or rendering harmless of its nuclear, chemical, and biological weapons, the 'technical' demarcation of its boundary with Kuwait and the establishment of a demilitarized zone. It would be difficult to justify such conditions, which would otherwise plainly be legislative, if not seen as guarantees against non-repetition within the framework of State responsibility.

The Council, while having called for compensation on other occasions,[71] established for the first time a compensation mechanism to serve as a comprehensive framework for dealing with Iraqi liability. In para 16 of Resolution 687 (1991), the Security Council reaffirmed Iraq's liability under international law:

References

> (p. 132) for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.

Resolution 687 (1991) led to the establishment of a United Nations Compensation Commission and the creation of a fund financed out of a determined percentage of Iraqi oil export revenues for the payment of claims.

In no other case of sanctions has State responsibility for violations of international law led to the State being subjected to such a wide-ranging regime of reparations. As Pierre-Marie Dupuy notes, while the Council preferred to remain within the framework of civil liability in responding to what may be termed an international crime, this is an interesting example of the institutionalization of the mechanism of compensation, which goes beyond a strictly bilateral relationship, and one which is defined by a political, not judicial, body.[72] However, unlike in the case of other claims tribunals, in which responsibility has first to be determined, the issues here were only the damage suffered by the claimant and the causal connection between this damage and the invasion and occupation of Kuwait.

Beyond State responsibility, it must be pointed out that the Security Council has also made the link between threats to international peace and security and the core crimes giving rise to individual criminal responsibility under international law, in the process institutionalizing such responsibility with the creation of the two International Criminal Tribunals on Yugoslavia and Rwanda.[73] This trend has continued in the resolutions on the combating of terrorism as in the creation of the Special Tribunal for Lebanon. The Rome Statute for an International Criminal Court further engages the Security Council by embedding the Council's discretionary determinations under article 39 within the Court's procedures, with potentially important implications for the legal position of individuals, for under the Rome Statute, the Council has been given powers of referral and deferral of the Court's jurisdiction, as well as a potential role in the determination of the crime of aggression.

In conclusion, though the Council's mandate is geared to maintenance of international peace and security, its decisions in numerous cases have nevertheless functioned as collective responses to particularly serious breaches of fundamental norms of international law, even when these are not embedded in the Charter, as for example, humanitarian law or international terrorism. The concept of international peace and security has thus acquired a meaning that extends far beyond that of collective security (envisaged as an all-out

collective response to armed attack), to one in which breaches of fundamental norms are considered component parts of the security fabric. This is the case even where there is no risk of an international armed conflict.[74]

(iii) Security Council measures and permutations in the concept of sanctions

The concept of sanctions lies at the heart of fundamental debates on the nature and function of international law. Yet while there are some commonly agreed elements to what

References

(p. 133) constitutes a sanction—they are legal consequences following on a violation of a legal obligation, they infringe the subjective legal rights of the party against whom they are directed, and they are measures which amount to a dispensation of the sanctioning State from a legal obligation—agreement seems to end here. There remain wide differences of views as regards the form they take, their content, conditions for their application and their purpose. Moreover, the traditional concept of sanctions has undergone certain mutations in international law, depending on the field of law in which it operates. This is particularly noticeable in regard to sanctions within the aegis of international organizations. Thus Roberto Ago had pointed out that the use of the word sanction in relation to the Charter was less strict.

From the debates which have ensued in the ILC, one can infer that sanctions may be characterized as follows:

(1) they function in a majority of cases as reactive measures taken in an institutionalized context to a breach of an international obligation having serious consequences for the international community as a whole;

(2) they include measures—enumerated in, or extrapolated from, article 41—which may consist in a temporary suspension of the subjective legal rights of the State against which they are applied, although they also include measures of retorsion; [75]

(3) they are measures the object of which includes cessation of continuous breaches, as a necessary prerequisite for the restoration of international peace, but which have also included reparation in a broad sense, guarantees of non-repetition or, more controversially, have been said to inflict punishment in the sense of causing irreversible harm; [76]

(4) they are measures which, under article 25 of the Charter, have amounted to the creation of a duty, not a right, on implementing States, thereby creating a 'vertical' relationship between these and the organization, as opposed to the 'horizontal' reactions taken unilaterally by States. [77] Unlike unilateral countermeasures, they may infringe the subjective rights of these States, in addition to those of the State against which the measures are applied;

(5) they are measures which have amounted to a dispensation for implementing States from the performance of obligations under other international agreements, and, in some circumstances, following on express derogations have resulted in the suspension of customary international law.

Do these measures constitute a special regime of responsibility or should they continue to be seen as mutations of a collective security system? This is a question of semantics; whatever they are called, these measures touch on issues of State responsibility and in the absence of Charter regulation of some of the issues arising under Security Council decisions, answers can only be sought within the framework of customary law.

References

(p. 134) (iv) Limits to the competence of the Security Council and the general rules of State responsibility

Security Council activism since the beginning of the 1990s has raised the question of the Charter and general international law limits to its action and brought resulting challenges to its decisions. The cases of Iraq reparations and the *Lockerbie* case were classic illustrations of this.

In establishing a claims resolution mechanism, the Council arguably went beyond its competence to impose economic and financial sanctions—temporary measures provided for under article 41 of Chapter VII. The ILC has distinguished carefully between the nature and function of two very distinct legal consequences of State responsibility, namely sanctions and reparations. The latter could only find the source of its rules in the general law on State responsibility and the Council could only act in a declaratory fashion; indeed it expressly affirmed the application of international law, *inter alia*, in resolution 687 (1991). Yet despite the fact that international law plainly had to constitute the standard, the Council, the Governing Council and the Commissioners of the UNCC, departed in many respects from these rules, particularly in the matter of attribution, diplomatic protection, and causation.[78] Iraq also challenged this mechanism before the UNCC on both substantive and procedural grounds.

In the case of Libya, the Security Council made the leap from individual to State responsibility for international terrorism, which it implicitly brought within the scope of article 2(4) of the Charter, by endorsing the findings of two of its permanent members that Libya bore responsibility for the acts of its agents and therefore was required to pay appropriate compensation, before the accused individuals had been brought to trial.[79] Libya challenged this before the International Court in the case of *Lockerbie*, but the case never reached the merits.

More recently, the legitimacy of the Security Council's so-called 'legislative' resolutions have been put in question and the problems of validity of Council resolutions and the limits of judicial review have re-surfaced.[80] However, the question of accountability of the Security Council as well as the concurrent responsibility of member States for its decisions, are beyond the scope of this contribution as stated earlier, so only the limits relevant to the responsibility of States for their own acts and obligations are addressed here.

The Charter does not refer to such limiting conditions, which are said to govern unilateral countermeasures. There is, for example, no condition for prior exhaustion of the peaceful settlement mechanisms of Chapter VI, nor an express requirement for a graduated or proportionate response.[81] In this case, can the rules of State responsibility supplement or assist in the interpretation of decisions of the Security Council? There seems to be no

References

(p. 135) reason why the action of States in adopting and implementing its decisions should not continue to be guided by the relevant customary law rules on State responsibility, so long as these do not 'prejudice the Charter'. Hence the relevance of the conditions and limitations on the taking of countermeasures in Chapter Two, Part II of the Articles to the adoption and implementation of sanctions, ie collective measures within an institutionalized context, bearing in mind that some of these are matters of progressive development. Far from prejudicing the Charter, such limitations would be in conformity with its Purposes and Principles which the Security Council under article 24(2) is bound to observe in adopting its decisions and which include not only the primary goal of peace maintenance, but also reflect the human rights, humanitarian, economic, and social concerns of the Organization. These are evolutionary, reflecting the changes in the international legal order—the human rights component, for example, includes recently emphasized economic, social and cultural rights, such as the right to food, to health, and to a decent standard of living.

This evolution of international law, which has included developments in human rights law and the emergence of a hierarchy of norms, influenced the debate in the ILC regarding the limits which should be placed on unilateral countermeasures[82] and is reflected in articles 49–51. While the powers of the Council in the discharge of its functions lie outside the mandate of the ILC, the UN as a whole cannot remain completely unaffected by this debate, for ignoring this with respect to the more far-reaching consequences of collective responses would permit States to evade the conditions on unilateral countermeasures by hiding behind the corporate veil.

The recent practice of the Security Council, as well as the practice of Member States and other UN organs, supports the view that the Council does not have unfettered discretion in the types of measures it adopts, that these have limits found not only in the Charter but also in general international law, and that Member States in the process of both adoption and implementation of the coercive decisions of the Security Council must also respect these limits.

It is surely not contrary to the purposes of the Charter to ensure that sanctions are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse.[83] By virtue of the very objective of Chapter VII—the restoration of international peace and security—sanctions decided on by the Security Council should not be punitive, but temporary and reversible in their effects.[84]

It would prove difficult to maintain today that a State could be sanctioned, ie divested of substantial rights, in the absence of a serious breach of a fundamental obligation. Also, while inevitably, the 'vertical' sanctions applied by the Security Council affect the position of non-sanctioned States, there have been serious attempts to redress that situation.[85]

While restrictions on the use of military force would obviously not apply to the 'vertical' measures decreed by the Security Council (article 50(1) of the Articles), some of the conditions cited in articles 50(1)(b)–(d), 50(2)(b) and 51 are very relevant to such measures.

References

(p. 136) Numerous discussions both outside and within the Security Council regarding the limits brought to sanctions by obligations for the protection of fundamental human rights and humanitarian law have been held.[86] This is a recognition that such measures should 'have minimal effects on private parties in order to avoid collective punishment'.[87] The humanitarian exceptions in Security Council resolutions (going back to the Rhodesian case) reflect this to some extent. Particular concern over the effects of the decade-long sanctions on Iraq on the civilian population[88] accelerated the trend towards so-called 'smart' or targeted sanctions. It is now increasingly unlikely that the Security Council will resort in the future to such drastic comprehensive trade sanctions. Other UN organs and treaty bodies, such as the Office of the High Commissioner for Human Rights, and the Economic, Social and Cultural Rights Committee, have been vocal in their view that member States continue to bear responsibility for their human rights obligations even when acting within the aegis of Chapter VII.[89] Similar views have been expressed by UNICEF, WHO, and FAO, as well as the International Committee of the Red Cross.[90]

Recent reform proposals have emphasized the links between collective security and respect for human rights as well as underlined that the term security referred to in article 1(1) can no longer be confined to the security of States, but must ultimately be destined to the protection of individuals; thus the various reports and declarations on UN reform are replete with references to 'human security' alongside state security. The 2005 World Summit Outcome Document of 20 September 2005 has also underscored the resolve 'to ensure that sanctions are carefully targeted in support of clear objectives' and that they are 'implemented in ways that balance effectiveness to achieve the desired results against the possible adverse consequences, including socio-economic and humanitarian consequences, for populations and third States'.[91]

The International Court of Justice in its *Namibia Opinion*, interpreting paragraph 2 of Resolution 276 (1970), has also held that the obligation on States not to enter into treaty relations with South Africa could not be applied to certain general conventions such as those of a humanitarian character, nor should the duty of non-recognition deprive the people of Namibia of any advantage derived from international cooperation.[92] In 2008, the European Court of Justice overruled the judgment of the Court of First Instance, by striking down an EC Regulation freezing the funds of an individual placed on a Security Council sanctions committee terrorist list on the grounds that it failed to respect certain

References

(p. 137) fundamental rights of the European Community—the right to be heard, the right to property, and the right to an effective legal remedy—despite the fact that it was intended to give effect to a Security Council Resolution that all EU member States were obliged to implement.[93]

As to the limits in the field of diplomatic or consular relations set by article 50(2)(b) of the Articles, it is interesting to note that some States in implementing Security Council sanctions in their domestic law, have introduced exemptions for diplomatic missions whether from third States or the target States, linked to their status in international law, despite the absence of an express exemption in Security Council resolutions.[94]

It is also evident that some degree of proportionality must apply to Security Council sanctions, although it is difficult to assess the meaning of proportionality in this context, which may go beyond 'the injury

suffered, taking into account the gravity of the internationally wrongful act and the rights in question' (article 51 ARSIWA), since they are measures necessary for the restoration of international peace and security. Several States speaking in the Security Council have affirmed the application of the principle of proportionality to sanctions.[95] In its Advisory Opinion concerning the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ affirmed that the customary law dual conditions of necessity and proportionality applied to article 51 of the UN Charter.[96]

Finally, it is by now generally accepted (and affirmed in the case-law) that Security Council measures cannot infringe peremptory norms of general international law.[97]

In short, the rules of State responsibility, unless specifically derogated from, or overridden by virtue of the Charter's hierarchical nature, are not displaced as such by the Charter. After all, it has been recognized that customary law rules can be used to 'fill in possible lacunae of the Treaty, to ascertain the meaning of undefined terms in its text or more generally, to aid interpretation and implementation of its provision'.[98] More specifically, the Court has stated in the *Nicaragua* case in the context of the relationship between Charter rules and customary law on use of force, that the latter retains a separate or parallel existence as between the parties—and not only *vis-à-vis* third States—even if they are similar to the treaty provisions.[99] A recent study by the ICRC on the customary law status of humanitarian law has also demonstrated that customary law rules operate in the interstices of conventional humanitarian law—eg in relation to armed conflicts under UN auspices.[100]

References

(p. 138) Conclusions

The interplay between the Articles on State Responsibility and the Charter of the United Nations is alluded to by article 59 without being at all clarified. While it is clear that the Articles are residual and, consistently with article 103 of the Charter, that Charter obligations must take priority, the Charter is evidently not a self-contained regime excluding the law of State responsibility in relation to matters on which the Security Council takes action—any more than for other matters.

Prima facie a breach of a Charter obligation amounts to an internationally wrongful act for the purposes of the Articles on State Responsibility. Although the Articles stipulate certain consequences of an internationally wrongful act in Part Two, the Commentary anticipates that serious breaches are likely to be addressed by international organizations including the Security Council and the General Assembly, and particularly by the Security Council in the case of aggression.

Although some ILC members objected to treating the UN's collective security mechanisms as a form of implementation of State responsibility, the Security Council in numerous cases has taken action by way of a collective response to violations of fundamental norms of international law and its resolutions have contained many legal elements which can only be understood as part of a regime of State responsibility. This extensive practice raises the question whether member States in pursuing in the Security Council the adoption of sanctions in consequence of internationally wrongful acts or in implementing such measures, ought not to continue to be subjected to certain of the limitations and requirements for such consequences in the ILC Articles. The customary law rules of State responsibility, far from being displaced, would in this way serve to supplement and mitigate the collective security system.

Further reading

G Arangio-Ruiz, 'Article 39 of the ILC Draft Articles on State Responsibility' (2000) 80 *Rivista di diritto internazionale* 747

G Arangio-Ruiz, 'On the Security Council's Law-making' (2000) 80 *Rivista di diritto internazionale* 609

J Combacau, *Le pouvoir de sanction de l'ONU* (Paris, Pedone, 1974)

J Crawford, 'The Relationship between Sanctions and Countermeasures', in V Gowlland-Debbas (ed) *United Nations Sanctions and International Law* (The Hague, Kluwer, 2001), 57

P-M Dupuy, 'Après la guerre du golfe …' (1992) 96 *Revue générale de droit international public* 621

M Forteau, *Droit de la sécurité collective et droit de la responsabilité internationale de l'Etat* (Paris, Pedone, 2006).

G Gaja, 'Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial. A propos des rapports entre maintien de la paix et crimes internationaux des Etats' (1994) 98 *RGDIP* 306
V Gowlland-Debbas, 'The Functions of the United Nations Security Council in the International Legal System', in M Byers (ed), *The Role of Law in International Politics* (Oxford, OUP, 2000), 305
V Gowlland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 *ICLQ* 55
V Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law. United Nations Action in the Question of Southern Rhodesia* (The Hague, Martinus Nijhoff, 1990)
A Kolliopoulos, *La Commission d'indemnisation des Nations Unies et le droit de la responsabilité internationale* (Paris, LGDJ, 2001)

References

Footnotes:

1 On the nature of the ILC Articles as a *lex generalis*, see Report of the ILC, 25th Session, *ILC Yearbook 1973*, Vol II, 161, 170 (para 42) .

2 Art 103 which reads: '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail', is accepted now as covering the derivative obligations of the Organization, in particular the mandatory decisions of the Security Council.

3 Commentary to art 56, paras 1–2.

4 See Riphagen, Fourth Report on State Responsibility, *ILC Yearbook 1983*, Vol II(1), 3,7 ; Report of the ILC, 48th Session, *ILC Yearbook 1996*, Vol II(2), 1, 62 .

5 For a critique of its provisions, see G Arangio-Ruiz, Fourth Report on State Responsibility, *ILC Yearbook 1992*, Vol II(1), 1, paras 260–266 ; G Arangio-Ruiz, 'Article 39 of the ILC Draft Articles on State Responsibility' (2000) 80 *Rivista di diritto internazionale* 747 . For the reaction of governments to art 39, see 'Topical Summary', XXXX A/CN.4/457, 15 February 1994, 82–85.

6 W Riphagen, Third Report on State Responsibility, ILC Yearbook 1983, Vol II (1), 3, 48 ; Commentary to draft art 5, para 2, Report of the ILC, 35th Session, *ILC Yearbook 1983*, Vol II(2), 43 ; Commentary to draft art 39, fn 226, Report of the ILC, 48th Session, *ILC Yearbook 1996*, Vol II(2), 58 .

7 G Arangio-Ruiz, 'Article 39 of the ILC Draft Articles on State Responsibility' (2000) 80 *Rivista di diritto internazionale* 747, 749 ; and G Arangio-Ruiz, Eighth Report on State Responsibility, *ILC Yearbook 1996*, Vol II(1), 1, 7–8, para 46 (emphasis added) .

8 See Commentary to draft art 19, Report of the ILC, 28th Session, *ILC Yearbook 1976*, Vol II(2), 96–122 .

9 Commentary to draft art 19, para 55, ibid, 118.

10 Art 14(3) and (4): *ILC Yearbook 1984*, Vol II(1), 4 .

11 See W Riphagen, Fourth Report on State Responsibility, *ILC Yearbook 1983*, Vol II (1), 3, 40 (para 111) .

12 W Riphagen, Fifth Report on State Responsibility, *ILC Yearbook 1984*, Vol II(1), 1, 4 .

13 G Arangio-Ruiz, 'Article 39 of the ILC Draft Articles on State Responsibility' (2000) 80 *Rivista di diritto internazionale* 747, 758–9 .

14 G Arangio-Ruiz, Seventh Report on State Responsibility, *ILC Yearbook 1995*, Vol II(1), 3, paras 70–119 and 140–146, respectively ; G Arangio-Ruiz, Eighth Report on State Responsibility, *ILC Yearbook 1996*, Vol II(1), 1, paras 25–46 .

15 J Crawford, First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(1), 1, 3, 8 . See also the comments by governments to the 1996 draft that 'universally condemned acts can now be expected to find their adequate legal and political response by the community of States' acting through existing institutional means, in particular, chapter VII of the Charter, cited ibid, para 52.

16 J Crawford, First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(1), 1, 3 . See also International Law Commission, State Responsibility: Comments and observations received from

Governments, Doc A/CN.4/488, 25 March 1998, art 39.

17 Commentary to art 59, para 2.

18 Introductory Commentary, para 4.

19 Commentary to art 54, para 2.

20 Commentary to art 40, para 9.

21 See, especially, the comments by James Crawford in relation to draft art 17 of the 1996 draft: J Crawford, Second Report on State Responsibility, 1999, A/CN.4/498, para 24 .

22 See eg Comments and observations received from Governments, A/CN.4/515, 19 March 2001, article 59, Slovakia, 92; observations by members of the ILC reproduced in A/CN.4/SR.2651 (3 August 2001), para 14; A/CN.4/SR.2652 (4 August 2001), paras 7, 13, 17–18.

23 Commentary to art 59, para 1.

24 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p 226, 245 (para 41); see also, ibid, para 39, and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), ICJ Reports 1986*, p 1, paras 175–179; also, P-M Dupuy, 'The Constitutional Dimension of the Charter Revisited' (1999) 1 *Max Planck Yearbook of United Nations Law* 1 .

25 See G Arangio-Ruiz, 'Article 39 of the ILC Draft Articles on State Responsibility' (2000) 80 *Rivista di diritto internazionale* 747, 761 , on the phrase 'without prejudice' in the context of his former proposals.

26 Commentary to draft art 39, fn 226.

27 ARSIWA, Introductory Commentary, para 5, and Commentary to art 12, para 6.

28 See Commentary to art 12, paras 3–5; para 8.

29 Commentary to art 16, para 9: art 16, it is pointed out, has a different rationale to art 2(5) of the United Nations Charter.

30 See Commentary to art 21, para 1.

31 See Commentary to art 22, para 1; Introductory Commentary to Part III, Chapter Two, esp para 6.

32 The clearest examples are art 5: suspension of a Member of the United Nations against which preventive or enforcement action is taken by the Security Council from the exercise of the rights and privileges of membership; art 6: expulsion of a Member of the United Nations which has persistently violated the Principles contained in the Charter; art 19: suspension of a Member of the United Nations from voting in the General Assembly due to arrears in its contributions.

33 Commentary to art 41, para 3.

34 See Commentary to art 40, para 9.

35 See 'Comments and observations received from Governments', A/CN.4/515, 19 March 2001, art 59, comments by Austria and Spain, 91–92.

36 See G Arangio-Ruiz, 'Article 39 of the ILC Draft Articles on State Responsibility' (2000) 80 *Rivista di diritto internazionale* 747, 755–7 .

37 R Ago, Eighth Report on State Responsibility, *ILC Yearbook 1979*, Vol II(1), 3, 45, paras 91–92 . See also W Riphagen, Third Report on State Responsibility, *ILC Yearbook 1982*, Vol II(1), 22, 57 and W Riphagen, Fourth Report on State Responsibility, *ILC Yearbook 1983*, Vol II(1), 3, 12 , referring to the United Nations as the representation of the international community.

38 See below, Chapter 80.

39 See R Ago, Fifth Report on State Responsibility, *ILC Yearbook 1976*, Vol II(1), 3, para 102ff ; Report of the ILC, 28th Session, *ILC Yearbook 1979*, Vol II(2), para 22ff . On this practice, see also G Arangio-Ruiz, Seventh Report on State Responsibility, *ILC Yearbook 1995*, Vol II(1), 3, paras 78–84 .

40 G Arangio-Ruiz, Seventh Report on State Responsibility, *ILC Yearbook 1995*, Vol II(1), 3, paras 97–98 .

41 Commentary to art 1, para 3; see also Commentary to draft art 1, paras 5 and 10, Report of the ILC, 25th Session, *ILC Yearbook 1973*, Vol II(1), 161, 174–175, 175–176 .

42 See eg Commentary to draft art 30, para 22, Report of the ILC, 31st Session, *ILC Yearbook 1979*, Vol II(2), 121 , in it is stated that the terms 'countermeasures' and 'measures' referred also to 'action by a State within the framework of sanctions ordered by a competent international organization on the basis of the rules by which it is governed'. For endorsement of this view of sanctions by the Special Rapporteurs: R Ago, Eighth Report on State Responsibility, *ILC Yearbook 1979*, Vol II(1), 3, paras 91–94 ; and G Arangio-Ruiz, Third Report on State Responsibility, *ILC Yearbook 1991*, Vol II(1), 1, paras 15, 27 . See also Commentary to art 22, para 3, referring to sanctions as: 'measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the United Nations Charter—despite the fact that the Charter uses the term "measures" not "sanctions" '.

43 L Cavaré, 'Les sanctions dans le cadre de l'ONU' (1952) 80 *Recueil des cours* 191, 200–201 .

44 See J Combacau, *Le pouvoir de sanction de l'ONU* (Paris, Pedone, 1974), 9–10 .

45 See A Serup, *L'Article 16 du Pacte et son interprétation dans le conflit Italo-Ethiopien* (Paris, Rousseau, 1938), 13, 17–19, and 52 .

46 But see the Dumbarton Oaks draft, Chapter VIII, B(2) and B(3), providing that enforcement action would be applied solely against a State which did not conform to a Security Council decision prescribing measures to be taken to restore international peace, and hence in breach of a conventional obligation (Doc.1, G/1, UNCIO IV/14).

47 H Kelsen, *The Law of the United Nations* (London, Stevens, 1950), 294 and H Kelsen, 'Collective Security and Collective Self-Defence under the Charter of the United Nations' (1998) 41 *AJIL* 783, 788 .

48 H Kelsen, *The Law of the United Nations* (London, Stevens, 1950), 7 . For other views on Chapter VII measures as legal sanctions, see C Leben, 'Les contre-mesures inter-étatiques et les réactions a l'illicte dans la société internationale' (1982) 28 AFDI 9, 22–24, 28 ; J Combacau, *Le pouvoir de sanction de l'ONU* (Paris, Pedone, 1974), 9–16, 104–106, 130–134 . See also, generally, L Cavare, 'L'idée de sanction et sa mise en oeuvre en droit international public' (1937) 41 *RGDIP* 385 .

49 For a useful survey of the literature, see A Kolliopoulos, *La Commission d'indemnisation des Nations Unies et le droit de la responsabilité internationale* (Paris, LGDJ, 2001), 54–64 .

50 G Arangio-Ruiz, 'On the Security Council's Law-making' (2000) 80 *Rivista di diritto internazionale* 609, 631 .

51 Ibid, 694 .

52 See eg the preamble of SC Res 665 (1990) on Iraq; and the by now common reference to the Sanctions Committees established under each sanctions regime.

53 For this practice and the analysis which follows, see V Gowland-Debbas, *Collective Responses to Illegal Acts in International Law. United Nations Action in the Question of Southern Rhodesia* (The Hague, Martinus Nijhoff, 1990) ; V Gowland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 *ICLQ* 55 ; V Gowland-Debbas, 'The Functions of the United Nations Security Council in the International Legal System', in M Byers (ed) *The Role of Law in International Politics* (Oxford, OUP, 2000), 305 .

54 See SC Res 215, 216 (1965), 232 (1966), 253 (1968), 423 (1978), 448 (1979)) on Southern Rhodesia and SC Res 418 (1977) and 569 (1985) on South Africa.

55 See SC Res 661, 664, 667, 670 (1990), and 687 (1991).

56 SC Res 713, 752, 757,770, 787 (1992), 819, 820 (1993), 836 (1993), 1160, and 1199 (1998).

57 See SC Res 794 (1992) and 837 (1992) on Somalia, 935 (1994) on Rwanda, and 1547 and 1556 (2004) on Darfur.

58 See eg SC Res 1304 (2000), 1493 (2003) on the DRC.

59 SC Res 748 (1992) in which the Council by referring to certain documents emanating from the governments of the US and UK implicitly attributes responsibility to Libya for the actions of its 'officials'. See also SC Res 1054 (1996) following on Sudan's refusal to extradite three terrorist suspects and general res olutions on terrorism such as SC Res 1566 (2004).

60 See eg SC Res 1373 (2001).

61 See eg SC Res 1718 (2006) on the Democratic Peoples' Republic of Korea and SC Res. 1737 (2006) on Iran, both concerned with the alleged failure of these States to live up to their treaty commitments.

62 SC Res 1636 (2005) endorsing the report of the United Nations International Independent Investigation Commission prepared pursuant to resolution 1595 (2005): S/2005/662, 20 October 2005.

63 SC Res 1530 (2004) which condemned the bombings 'perpetrated by the terrorist group ETA' which the evidence later denied. It will also be noted that subsequent reports of the UN International Independent Investigation Commission were not so categorical about the attribution of the Hariri assassination to Syria.

64 See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, ICJ Reports, 1971*, p 50.

65 See eg for Southern Rhodesia: SC Res 216, 217 (1965), 277 (1970), and 423 (1978); Iraq: SC Res 662, 670 (1990), 706, and 712 (1991); former Yugoslavia: SC Res 777 (1992), 820, and 821 (1993).

66 See as illustrations: for Iraq/Kuwait: SC Res 661, 670 (1990) and 1137 (1997); former Yugoslavia: SC Res 713 (1991), 757, 787 (1992), 820, 942 (1993), 1160 (1998); Somalia: SC Res 733 (1992); Libya: SC Res 748 (1992) and 883 (1993); Liberia: SC Res 788 (1992); Haiti: SC Res 841 (1993); Rwanda: SC Res 918 (1994); Sudan: SC Res 1054 (1996); Sierra Leone: SC Res 1132 (1997); Afghanistan: SC Res 1267 (1999); Democratic Republic of the Congo: SC Res 1493 (2003); Korea: SC Res 1718 (2006) and 1874 (2009); Iran: SC Res 1737 (2006).

67 See reference to art 103 in SC Res 670 (1990). There is also a growing case law in this respect, eg: see Orders of 14 April 1992 (Provisional Measures), *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* and *(Libyan Arab Jamahiriya v United States of America)*, Provisional Measures, Orders of 14 April 1992, *ICJ Reports 1992*, p 3 and 114, 115, and 126 (paras 39 and 42), respectively; *European Court of First Instance, Case T/306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission*, §§231, 234; *European Court of First Instance, Case T 315/01, Yassin Abdullah Kadi v Council and Commission*, §183–4 *(although see now European Court of Justice (Grand Chamber), Joined Cases* C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, Judgment of 3 September 2008.

68 See eg the statements by Lord Caradon (UK) and US Ambassador Goldberg during the debate preceding the adoption of Resolution 221 (1966) which authorized the search and seizure of ships on the high seas, in SCOR, 2lst yr, 1276th mtg, paras 21 and 68, and 69, respectively.

69 See Southern Rhodesia: SC Res 221 (1966); Iraq: SC Res 665 (1990), 678 (1991); former Yugoslavia: SC Res 770, 787 (1992), 816 and 836 (1993); Somalia: SC Res 794 (1992); Haiti: SC Res 875 (1993), 917, 940 (1994), 1031 (1995); Rwanda: SC Res 929 (1994)): Côte d'Ivoire: SC Res 1464 (2003); Democratic Republic of the Congo: SC Res 1484 (2003).

70 Commentary to draft art 30, para 14, Report of the ILC, 31st Session, *ILC Yearbook 1979*, Vol II(2), 119 .

71 See eg SC Res 487 (1981), 387 (1976), and 527 (1982).

72 P-M Dupuy, 'Après la guerre du golfe …' (1992) 96 *RGDIP* 621, 637 .

73 SC Res 808 and 827 (1993), and 955 (1994), respectively): see ICTY, *Prosecutor v Tadić*, Case No IT-94-1-A, Judgment, Appeals Chamber, 2 October 1995, which upheld the view that the legality of its creation rested on art 41 of the UN Charter.

74 For similar views, see G Gaja, 'Réflexions sur le rôle du Conseil de sécurité dans le nouvel ordre mondial. A propos des rapports entre maintien de la paix et crimes internationaux des Etats' (1994) *RGDIP* 306 ; and P-M Dupuy, 'Après la guerre du golfe …' (1992) 96 *RGDIP* 621 .

75 'In the language of the United Nations, as previously in that of the League of Nations, the use of the word "sanctions" does not mean exclusively actions which infringe what in other circumstances would constitute a genuine right …': Commentary to draft art 30, para 13, Report of the ILC, 31st Session, *ILC Yearbook 1979*, Vol II(2), 119 .

76 See R Ago, Eighth Report on State Responsibility, *ILC Yearbook* 1979, Vol II(1), 3, para 79 .

77 See G Arangio-Ruiz, Third Report on State Responsibility, *ILC Yearbook* 1991, Vol II(1), 1, para 15 .

78 For example, in holding Iraq responsible also for damages incurred by the Coalition forces, regardless of respect for the *jus in bello*; or for disregarding the conditions for invoking the responsibility of a State, namely, the requirement of nationality of claims and exhaustion of local remedies. See B Stern, 'Une

procédure mi-politique, mi-juridictionnelle: le règlement des réparations dues par l'Irak à la suite de la crise du Golfe', in Y Daudet (ed), *Actualités des Conflits internationaux* (Paris, Pedone, 1993), 171, 178 .

79 See SC Res 748 (1992).

80 S Talmon, 'The Security Council as World Legislature' (2005) 99 *AJIL* 175 ; G Abi-Saab, 'The Security Council as Legislator and as Executive in its Fight Against Terrorism and Against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy', in R Wolfrum and V Röben (eds), *Legitimacy in International Law* (Berlin, Springer, 2008), 109 .

81 See Commentary to draft art 30, para 22, Report of the ILC, 31st Session, *ILC Yearbook 1979*, Vol II(2), 121 Find it in your Library.

82 See G Arangio-Ruiz, Third Report on State Responsibility, *ILC Yearbook 1991*, Vol II(1), 1 Find it in your Library; G Arangio-Ruiz, Fourth Report on State Responsibility, *ILC Yearbook 1992*, Vol II(1), 1 Find it in your Library; J Crawford, Third Report on State Responsibility, 2000, A/CN.4/507 Find it in your Library.

83 See Introductory Commentary to Part Three, Chapter Two, paras 2, 6.

84 See in regard to unilateral measures, see Commentary to art 49, paras 1, 7; and art 53, ARSIWA.

85 See GA Res 49/58, 50/51, 50/58E, 51/208, etc, inviting an examination of the special economic problems confronting States in carrying out sanctions, under Charter art 50.

86 See for similar debate in the League of Nations, Reports and Resolutions on the Subject of Article 16 of the Covenant, 13 June 1927, 11ff, cited in G Arangio-Ruiz, Third Report on State Responsibility, *ILC Yearbook 1991*, Vol II(1), 1, 17 Find it in your Library.

87 See Commentary to art 50, para 22.

88 See eg Letter dated 13 April 1995 from the five permanent members of the Security Council (Doc S/1995/300); Boutros Boutros-Ghali, General Assembly, Report of the Secretary-General on the Work of the Organization, Supplement to an Agenda for Peace, 1995, para 70, and Report of the Secretary-General submitted pursuant to Council requests in resolutions 1284 (1999) and 1281 (1999) on the humanitarian needs in Iraq (Doc.S/2000/208).

89 See UNHCHR, *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while Countering Terrorism*, 2003, and Committee on Economic, Social and Cultural Rights, General Comment 8 (1997), UN Doc E/C.12/1997/8, 5 December 1997, para 1.

90 On the applicability of human rights and humanitarian law to UN sanctions, see V Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (The Hague, Kluwer, 2001), Part II Find it in your Library; M Reisman and D Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanctions Programme' (1998) 9 *EJIL* 86 Find it in your Library; see also Commentary to art 50, paras 6 and 7.

91 World Summit Outcome Document A/RES/60/1, paras 106–108.

92 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971*, p 15, 55, and 56.

93 European Court of Justice (Grand Chamber), Joined Cases C-402/05 P and C-415/05, *P Yassin Abdullah Kadi and Al Barakaat International Foundation*, Judgment of 3 September 2008.

94 See V Gowlland-Debbas, *National Implementation of United Nations Sanctions: A Comparative Study* (The Hague, Martinus Nihjhoff, 2004), 52, 107 (Belgium), 246–247 (Germany), and 555 (Switzerland) Find it in your Library.

95 See eg SCOR, 4128th mtg, 17 April 2000; and GA Res 51/242 (1997), Annex II, 7, para 1; see also Statement by the President of the Security Council, S/PRST/2000/12 (7 April 2000), 4.

96 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, 226, 245 (para 41).

97 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Provisional Measures) (Order of 13 September 1993), Provisional Measures, ICJ Reports 1993*, 325, 440, separate opinion of Judge ad hoc Lauterpacht; European Court of First Instance, Case T/306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission*, paras 281–282;

European Court of First Instance, Case T 315/01, *Yassin Abdullah Kadi v Council and Commission*, paras 226, 230; see also Commentary to art 50, para. 9.

98 *Amoco International Finance Corporation v Iran* (1987-II) 15 *Iran-US CTR* 222 (para 112).

99 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States of America), Merits, Judgment, ICJ Reports 1986*, 1, 93–96 (paras 175–179).

100 J-M Henckaerts and L Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge, CUP, 2005) Find it in your Library.
