HOBBES, KANT AND THE LIKELY IMPACT OF THE I.L.C.'S ARTICLES ON STATE RESPONSIBILITY

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"¿Qué capitán es éste, qué soldado en la guerra del tiempo?"
Lope de Vega

I. INTRODUCTION

As anyone with a minimal notion of Spain's great literary tradition could already have noted, Don Quixote's conspicuous warning to Sancho Panza applies squarely to "the things of international law".[1] The issue of State responsibility stands as a remarkable example, indeed, of Miguel de Cervantes' world-wide known character's wisdom as applied to all bureaucratic activity able to potentially threaten to tame the same power it serves.[2] Although the International Law Commission took more than 45 years to draft its Articles on Responsibility of States for Internationally Wrongful Acts,[3] their future is bound to remain inextricably linked to their present in the years to come. Are we

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[1] I am, of course, referring *to "Las cosas de palacio van despacio..."*

[2] See, similarly: Allott, Philipp, "State Responsibility and the Unmaking of International Law" *Harvard International Law Journal*, vol.29, Nº1, Winter, 1988, p.1-26 at 8.

[3] "Report of the Internacional Law Comisión on the Work of its Fifty-Third Session", *Gen.Ass. off. Recs., Fifty-sixth Session*, Supp. No.10 (Doc.A7 56/10), reproduced in Crawford, J., *The Internacional Law Comission on Articles on State responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002 (Hereinafter the I.L.C.'s Articles)

witnessing the onset of a new period of "legal interregnum" in the field? Whether one favours the use of this expression or not, the truth still remains that we will not dispose of an international convention in vigour, at least, for the next twenty years. Furthermore, the mere convenience of having a convention on State responsibility is increasingly challenged and, arguably, for some sound reasons.

In the meantime, the "invisible college's"[4] interest on issues of State responsibility is gradually re-emerging after the period of doctrinal exhaustion (and, not least, boredom) that followed the completion of almost five decades of codifying and progressive developing effort. In this context, it is not hard to foresee that the doctrinal truce that marked the end of such a lengthy intellectual task will not last. The multilayered nature of the topic makes of it the perfect candidate for a renewal of the hostilities in relation to its most sensitive normative issues. The light-foot heralds of international law have already begun to whisper the news. Therefore, it will not constitute any surprise if the I.L.C.'s Articles are soon again under a virtual state of siege.

Against this background, this paper is an attempt to reflect on some of the likely impacts of the I.L.C.'s Articles on the international legal system taking as Ariadna's thread the historical struggle between the so-called Hobbesian and Kantian paradigms of international law in their simplest form. In doing so, I will firstly recall both the State's and doctrinal reactions to the I.L.C.'s Articles' eventual completion. Secondly, I will re-examine their impact taking as reference three main guideposts (unification, consolidation and clarification) with special attention to the recent pre- and post- 2001 related jurisprudence of the International Court of Justice. Thirdly, I will revisit today *Stateless*[5] notion of international crimes and the connected issued of the emergence of a system of aggravated responsibility within the international community in the light of the aforementioned paradigmatic combat. A final conclusion on the future of the I.L.C.'s Articles in view of both the advantages and disadvantages of the adoption of a convention in the field of State responsibility will round off this paper.

II. THE STATE'S REACTION TO THE I.L.C.'S ARTICLES

After more than 45 years of intergenerational scholarly work on the topic at the International Law Commission, the completion of the I.L.C.'s Articles was positively welcomed by the international community of States as witnessed by the diplomatic statements that accompanied its subsequent adoption by the UN General Assembly.[6] The rationale for highlighting introductorily this aspect is to remind us of some well-

[4] See: Schachter, Oscar, "The Invisible College of International Law", in *Northewestern Review*, 1977, pp.217-226. See, as well, Schacter, O., "Metaphor and Realism in International Law" in *Studi di Diritto Internazionale in Onore de Gaetano Arangio-Ruiz* (Vol.I), Editoriale Scientifica, 204, pp.211-216

[5] I have coined the expression "Stateless notion" for metaphorical purposes. I am indebted to GIIS's professor Vera Gowland for pointing out the terminological difficulties than any other use of the term would have posed.

[6] ILC Report on its 53rd Session to the UN General Assembly, *General Assembly Documents*, 56th Session, Suplement No.10, UN Doc. A/56/10. See also: A/ Res/ 56/83 of 12 December 2001 & Government Comments on the Draft Articles http://www.law.cam ac.uk/rcil/ILSR

known facts which should, nonetheless, be kept in mind when dealing with what Ian Brownlie has defined as "the most basic part of general international law".[7]

The first one is, despite its international lawyer's litany-looking character, the aspiring-by-definition nature of the law of State responsibility (synonym of "liability for failure to observe obligations imposed by the rules of the international legal system"[8]) designed to operate within an international community of juxtaposed sovereign States understood as primary subjects of a legal order without legislative organised power, superior universal judge or real sanctioning coercive body. The fundamental importance of State's acquiescence to a set of norms officially elaborated at their request and primarily portrayed to meet their needs follows naturally from this traditional reminder of the long-standing legal international *status quo*. However, even if it became to be seen as the major obstacle for the States to accept the I.L.C.'s text, it could be unfair to exclusively blame it for this warm reception to the last Special Rapporteur's pragmatic effort to meet previous governmental criticisms by "decriminalising" State responsibility. The truth is that there was an overwhelming awareness of the need to clarify a domain which had been defined by Charles de Visscher as "le corollaire obligé de l'égalité des Etats" as reflected by tribunals' eagerness to cite the Commission's texts even before their formal adoption.[9]

Secondly, recalling the importance of State's prima facie satisfaction with the final text of the I.L.C.'s Articles serves to remind us of previous failed attempts to codify and progressively develop other aspects of international law which had not yet counted with the necessary number of ratifications to come into force. As it is well known[10], as of October 2005, of the ten codification conventions adopted so far under the UN auspices, only four have been almost universally acceded or ratified (the 1961 Vienna Convention on Diplomatic Relations with 184 parties, the 1963 Vienna Convention on Consular Relations with 168 parties, the 1969 Vienna Convention on the Law of Treaties with 105 parties and the 1982 UN Convention on the Law of the Sea with 149) two of them are minimally expressive of any international consensus (the 1969 Convention on Special Missions with 36 parties and the 1978 Vienna Convention of Succession of States in Respect of Treaties with 19) and four are not yet in force (the 1975 Vienna Convention on Representation of States in their Relations with International Organisations with 32 parties, the 1983 Vienna Convention on Succession of States in Respect of Property, Archives and Debts with 7 parties, the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations with 40 parties -but not yet in force- and the recently

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[7] Brownlie, Ian, "State Responsibility and the Internacional Court of Justice" in *Issues of State Responsibility Before Internacional Judicial Institutions* (Ed. by Fitzmaurice, M.,& Sarooshi, D.,) Hart Publishing, 2004, pp.11-19 at 12

[8] See: Harris, D.J., *Cases and Materials on International Law.* Sweet & Maxwell, London, 6th Edition 2004.

[9] Various commentators have raised this point. See e.g.: Rosenstock, Robert, "The ILC and State Responsibility", *American Journal of International Law*, " Vol. 96, No.4 (Oct., 2002) , pp. 792-797 at 792

[10] I have updated Zemanek's recount on this aspect by taking as source http:// untreaty.un.org. visited on 26 October 2005. See: Zemanek, Karl, "Appropriate Instruments for Codification: reflections on the ILC Draft on State Responsibility", in *Studi di Diritto Internazionale in Onore de Gaetano Arangio-Ruiz* (Vol.II), Editoriale Scientifica, 204, pp.897-918

adopted UN Convention on Jurisdiction Immunities of States and their Property on which was opened for signature on 17 January 2005). In the light of the aforementioned, a realist could wonder whether there is any purpose in building a metaphorical "hotel de luxe" in terms of State responsibility when the international community of States is still mainly "aubergiste" and even to a great extent "aubergiste à l'espagnole". The arguments advanced by James Crawford in assessing the pros and cons of the two options the I.L.C. was confronted with when it concluded to draft the Articles (the adoption of a convention on State responsibility or some form or endorsement of the articles by the General Assembly) and the consensual final two-stage approach decided upon by the ILC seems to reflect a similar understanding.[11]

Thirdly, as it is also well known, on 12 December 2004, the GA passed a resolution (to which the draft articles are annexed) taking note of the Articles and commending them to the attention of governments. Three years later, on 2 December 2004, on the occasion of considering the possibility of convening a diplomatic conference of plenipotentiaries with a view of concluding a convention on the topic, the GA commended again the Articles to the attention of governments and decided to include the item in the provisional agenda of its 62th session in 2007. However, despite the diplomatic indifference (in such a contrast, one could argue, with the I.L.C.'s long-standing "diplomatic awe" in this respect) by which the possibility of convening a conference has been welcomed, the warm reception by the States remains the best sign we dispose for measuring their likely impact on the international legal system if not for other reason that because States remain the main actors in "the normal processes of the application and development of international law".[12]

II. THE DOCTRINAL REACTION TO THE I.L.C.'S ARTICLES

Despite its own somehow paradoxical efforts to minimise its own influence in the development of international law (at least when it comes to discuss the scope of paragraph 1.-d, of article 38 of the I.C.J. Statute) the importance of the doctrine as the driving force behind a work which is seen to be a "doctrinal codification"[13] cannot be denied. Its own reaction to the I.L.C.'s Articles constitutes therefore a basic tool in trying to discern their likely impact on the international legal system or, using the words of the last Special Rapporteur, its "wide implications for international law as a whole".[14]

"*In the confrontation between Hobbes and Kant, the former, though having suffered some noteworthy retreats, is definitively still ahead on points*"[15]. This ready-to-quote statement by one of the legal scholars who has most extensively written on the subject

[11] Crawford, James, "Essay 17: The ILC's Articles on Responsibility of States for International Wrongful Acts: Completion of the Second Reading" (with Jacqueline Peel and Simon Olleson), *International Law as an Open System: Selected Essays by James Crawford*, Cameron May, 2002 pp.399-429 at 405

[12] Crawford, J., *The Internacional Law Comission on Articles on State responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002 at 59

[13] Daillier, P. et Pellet, A.,Droit International Public, L.G.D.J., Paris, 7ºed., 2002 at 763

[14] Crawford, *op.cit.* (note 10), at 406

[15] Dupuy, Pierre-Marie, "A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility", *European Journal of International Law*, 13 (2002) pp.1053-1081at 1080

of State responsibility summarises what appears to be a widespread doctrinal perception when assessing the scope of the I.L.C.'s Articles. In fact, by noting the classical dichotomy between the two simple conceptual poles represented by the Hobbesian "state of nature" and the Kantian "perpetual peace" paradigms of international law, J. M. Dupuy, (a Kantian himself[16]) is making reference to the still leading position, in this already classical conceptual fight, of the juxtapositive paradigm -as defined by Paul Reuter- of the international community of States towards the integrative one; or -using terms more common to this field of study- between the bilateral (classical law inherited from the essentially bilateral and reparatory international responsibility as represented by D.Anzilotti) and the multilateral conception of state responsibility embodied by R.Ago. This recurrent dichotomy can also be identified in the opposition between the so-called "voluntarist positivism" and the normative dimension of the international community or, in other words, between the perception of international law as a law of coexistence among sovereign states or its preferred understanding as a law of cooperation. In fact, most authors took sides with the former statement in noting that the value of the I.L.C.'s Articles "lies less in their legal innovation than in their consolidation and clarification of many traditional secondary rules".[17] For innovation one should understand in this context the progressive development of the modern, Kantian, integrative, multilateral understanding of State responsibility as confronted with the bilateral or traditional one.

But to which "*noteworthy retreats suffered by Hobbes"* professor P-M.Dupuy referred? Taking as a reference the comparison between the classical and modern law of State responsibility traced by professor Cassese,[18] one should be able to point out to some indicators. Apart from the fact that the new law of State responsibility has clarified and given precision to a good number of controversial aspects (the question of damage, fault or circumstances precluding wrongfulness among others) or that it is now generally agreed that a distinction can be made between primary and secondary rules thanks to R. Ago, some specific elements are, nonetheless, worthy of special attention. We will briefly recall the following ones:

First, the modern distinction between ordinary and aggravated responsibility, a legal phenomenon which in professor Abi Saab's own terms amounts to the "emergence of a backbone for the international system, which marks a higher stage of evolution from the invertebrate to the vertebrate"[19] Second, the acceptance (although the term "other than the injured state" is preferred for the sake of conceptual clarity) by the I.L.C. of the notion of interested states (in what constitutes a departure from the controversial dictum of the ICJ in the second phase of the *South West Africa* Case (1966)[20]) and the legal regime associated to it by article 48. This could, obviously, have not been possible without the further recognition of the notion of "obligation owed to the international

[16] His views are well-known, See: Dupuy, P.M., *L'unité de l'ordre juridique international (Cours Général de droit international public),* 2000. R.C.A.D.I. Tome 297, 2002.
[17] Bodansky, Daniel and Crook, John, R, "Introduction and Overview" *American Journal of International Law*, "Symposium: the ILC's State Responsibility Articles" Vol. 96, No.4 (Oct., 2002) pp. 773-791 at 790
[18] See: Cassese, Antonio, *International Law*, Oxford University Press, 2nd ed., 2005 at.241-245
[19] See: Abi-Saab, Georges, "The Uses of Article 19", *European Journal of International Law*, Vol.10, 1999/2 pp. 339-351
[20] See: Commentary to article 48, note 766 in Crawford, J., *op.cit.* (note 11) at 278

community as a whole"[21] as first enunciated by the I.C.J. in the *Barcelona Traction* case (1970).[22] Third, the longer path that a State is now legally obliged to "walk" before it can resort to peaceful -and only peaceful- countermeasures being the general obligation of "peaceful settlement of disputes" now firmly in its way. Both the former and the acceptance by the I.C.J. of the declaration of unlawfulness as a form of reparation by satisfaction[23] indicate a progressive - although timid- departure from the exclusively reparatory perception of the law of State responsibility toward a broader understanding of its relevance on the plan of the restoration of legality. The latter point is further advanced by the accordance to "a State other than the injured State" of the right to claim from the responsible State assurances and guarantees of non-repetition if circumstances so require.[24] Fourth, the door opened by the I.L.C. to the future possibility of collective countermeasures in the collective interest thanks to its expressly ambiguous formulation in the I.L.C.'s Articles.[25]Fifth, the further recognition of the notion of "ius cogens" which works along the articles as a general barrier for the operativeness of circumstances precluding wrongfulness[26] and as a limit for countermeasures.[27]

Despite these noteworthy improvements, this should not be understood, however, as a rejection of professor Dupuy's view in this respect. I will instead inquire as to whether the underlying idea informing his statement (the fact that Hobbes is perceived to be "definitively still ahead on points") has affected the way the scholarly community has perceived the I.L.C.'s final outcome. As far as the historical paradigmatic dimension is concerned, it is undeniable that a certain sense of disappointment seemed to permeate the final doctrinal assessment of the I.L.C.'s Articles. In fact, a reader will look in vain for enthusiastically praiseworthy expressions of the kind "a turning point in the development of international law", or a "great step in the progress of international legal system" referred to them. One can only wonder if the appraisal would have been different if Kant had been perceived "to be ahead in points" and, if this general assessment reflects the general retreat from positivism "à la *Lotus*" that characterises contemporary international legal scholarship. But to conclude from this that the I.L.C.'s work is generally considered to be a failure lies a great distance and assessments that point to the important legal achievements resulting from them are not lacking. In other words, despite the fact that the topic of the multilateral dimension of international obligations and the interrelated issue of former Article 19 attracted most of the doctrinal attention, the truth is that most general assessments on the I.L.C.'s Articles are positive measurements of their likely impact : "it is hoped that they will make a significant contribution to the codification and progressive development of the international legal

[21] See, in this respect, S. Rosenne: "The expression "the international community as a whole" is not a term of art. Apparently it is designed to embrace two by no means identical types of international obligation: an obligation arising out of a *ius cogens* norm; and an obligation arising out of a rule that is addressed *erga omnes* to all States, but which is not itself a norm of *ius cogens* (…)" Rosenne, Shabtai, "Decisions of the International Court of Justice and the new law of State responsibility" in *International Responsibility Today, Essays in Memory of Oscar Schachter(*Ed. by Mauricio Ragazzi) Martinus Nijhoff Publishers, 2005, pp.297-309

[22] See: *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p.3, at p.32, para.33

[23] See: Para (10) of Commentary to article 30 in Crawford, *op.cit.* (note 11) at. 198

[24] See: Articles 30 and 48 in Crawford, *Ibid.* at. 196 and 276

[25] See: Article 54 and Commentary in Crawford, *Ibid.*, at. 302-305

[26] See: Article 26 and Commentary in Crawford, *Ibid.* ,at. 187-188

[27] See: Article 50 and Commentary para. (9) in Crawford, *Ibid.*, at. 288-290

rules of responsibility"[28] or "a major contribution to the consolidation of the international law of state responsibility as a tool for the reparation of international wrongs and the restoration of international legality"[29] or even "the Commission has constructed a solid foundation for future development of the law in the light of changing circumstances".[30] Against this background, it should be noted that in assessing the work on specific branches of State responsibility, commentators are far more critical: "decades of work on the law of reparations have produced few answers and many more questions"[31] or "they do not deal sufficiently with the right of individuals and non-state entities to invoke the responsibility of States"[32].

III. THE LIKELY IMPACT OF THE I.L.C.'S ARTICLES ON THE INTERNATIONAL LEGAL SYSTEM

However, despite its shadows and open controversies, the completion of the I.L.C.'s Articles marks "une étape importante dans le développement et la clarification du droit international de la responsabilité"[33] and this could not be without effect on the international legal system as a whole. Has an invertebrate international legal system found its own soft spine as a step forward in its natural evolutionary character? Despite some, already referred, leading scholar's coincidental (and previous) mention to the same notion applied to the so-called "aggravated responsibility"[34], I prefer to pick up a more prosaic expression ("A significant moment in the continuing development of international law"[35]) as a first reference in dealing with this topic.[36] In trying to discern it, three key-terms will serve us as guideposts: unification, consolidation and clarification.

1. Unification

The tension between unity and fragmentation of international law is in, all likelihood, one of the most fashionable theoretical topics in the international legal scholarship of our day and age. Evidence of the great interest that currently attracts this topic is the fact that since 2002 (54th session) the International Law Commission included the issue in its programme and established a study group under the title "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of

[28] See: Crawford, J., *op.cit.* (note 11) at 60
[29] See: Dupuy,P.M., *op.cit.* (note 14) at 1053
[30] Rosenstock, Robert, "The ILC and State Responsibility", *American Journal of International Law*, "Symposium: the ILC's State Responsibility Articles" Vol. 96, No.4 (Oct., 2002), pp. 792-797 at 797
[31] See: Shelton, Dinah, "Righting Wrongs: Reparations in the Articles on State Responsibility", *American Journal of International Law*, "Symposium: the ILC's State Responsibility Articles" Vol. 96, No.4 (Oct., 2002), pp- 833-856
[32] See: Brown Weiss, Edith, "Invoking State Responsibility in the Twenty-First Century", *American Journal of International Law*," Symposium: the ILC's State Responsibility Articles" Vol. 96, No.4 (Oct., 2002), pp. 798-816 at 799
[33] See: Dupuy, Pierre-Marie, *Droit International Public*, Dalloz, 6º ed. 2002 pp. 449-505 at 453
[34] See: Abi-Saab, *op.cit.* (Note 17)
[35] See: Bodansky & Crook *op.cit.* (note 15) at 77
[36] Professor and Judge Abi-Saab likes to characterise law as an "unfolding purpose" as well. See: Abi-Saab, G., *Cours général de droit international public*, R.C.A.D.I., Tome 207, 1987

International Law".[37] As posed in its most basic form, the current challenge for the unity of international law seems to result from the combined threat resulting from three parallel phenomena: firstly, the multiplication of partial legal orders resulting from the constitutive treaties of international organisations; secondly, the multiplication of self-contained regimes in the fields of human rights, environmental protection and others; and thirdly, the proliferation of international tribunals on the regional and universal level. Whatever the outcome of the I.L.C.'s study group under the chairmanship of M.Koskenniemmi in assisting international judges and practitioners in coping with the consequences of the diversification on international law, the likely impact of the I.L.C.'s Articles on State responsibility is that of playing "an unifying role" in this respect by contributing to the unity of interpretation of international norms. This conclusion derives naturally if one acknowledges that international tribunals are likely to be the articles' primary consumers as reflected by tribunals' eagerness to cite the Commission's texts even before their formal adoption. I will briefly address some recent[38] case law:

Firstly, In the *Gabcikovo–Nagymaros* case (1997) the I.C.J. cited Articles 47 to 50 of the Draft Articles on State responsibility adopted by the ILC in 1996 to establish the conditions a countermeasure should meet in order to be justifiable.[39] The Court also relied on Article 33 of 1996 Articles (now Article 25) to evaluate the existence of a state of necessity as a circumstance precluding wrongfulness in the light of the criteria laid down by the I.L.C. [40] Another explicit reference can be found in Article 17 (now Article 12) on the occasion of the brief treatment the I.C.J. made up of the relationship between the law of treaties and the law of State responsibility.[41] Finally, the Court referred to the commentary of by then Article 41 (its correlative is to be found now in Article 14) to make reference to preparatory acts as distinguished from the wrongful act itself.[42] Secondly, in the *Cumaraswamy* case (1999) the ICJ referred again to the draft articles of State responsibility declaring that the legal maxim according to which "the conduct of any organ of a State must be regarded as an act of that state" as embodied in by then Article 6 (now Article 4) was as a well-established rule of international law.[43] Thirdly, in the *LaGrand* case (2001), the I.C.J. consecrated the obligation of the responsible State to offer "assurances and guarantees of non repetition"[44], a subject which was debated in the Commission at that time and is now enshrined in Article 30.

This trend has been confirmed by the post-2001 I.C.J.'s case law:

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[37] See: Report of the International Law Commission on the work of its fifty-sixth session, Chapter 10 (2004) in http:// www.un.org/law/ ilc/reports/2004/ english/chp 10e-pdf.

[38] R.Higgins has noted in this respect: "Since the early 1970s, the periodic findings on State responsibility that the Court has had occasion to make have been pronouncements handed down against the background of intermitent work by the I.L.C. on State responsibility (…) whether there is a symbiotic relationship to be traced is for others to decide" Higgins, Rosalyn, the International Court of Justice: Selected Issues of State Responsibility in *International Responsibility Today, Essays in Memory of Oscar Schachter* (Ed. by Mauricio Ragazzi) Martinus Nijhoff Publishers, pp.297-309 at 271-272

[39] See: *Gabcikovo-Nagymaros (Hungary/ Slovakia) ICJ Reports 1997*, p. 55, para.83.

[40] See: *Gabcikovo- Nagymaros*, p.26, par. 50

[41] See: *Gabcikovo-Nagymaros* p.35, par.47

[42] See: *Gabcikovo-Nagymaros*, p.54, par.79

[43] See: *Difference Relating to immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, ICJ Reports 1999*, p.62, at p.87 para. 62

[44] See: *LaGrand (Germany v. United States of America), ICJ Reports 2001*, paras.123-128.

Firstly, In the *Arrest Warrant* case (2002),[45] although the Court did not cite the I.L.C.'s Articles, the manner in which it addressed the issue of remedies was a clear application of articles 35 (restitution) and 37 (satisfaction). Secondly, In the *Land and Maritime Boundary between Cameroon and Nigeria* case (2002), which put into focus, as noted by R.Higgins, the aspect of what is the place of the law of State responsibility in a case principally concerning territorial title,[46] the Court was again implicitly applying Part Two of the I.L.C.'s Articles when it upheld Cameroon's first claim concerning Nigeria's obligation of withdraw its administration and its military and polices forces from a previously occupied territory. It should moreover be noted that when the Court rejected Cameroon's second claim (regarding "assurances and guarantees of non repetition"), while affirming that those "submissions are undoubtedly admissible", it was drawing on its previous dictum in the *LaGrand* case and, therefore, further recognising the legal character of Article 30 at this respect. Thirdly, In the *Avena and other Mexican Nationals* case (2004),[47] besides dealing with issues of classical attributability and appropriate remedies following from the breach of obligations, the Court specifically noted that its dictum in the *LaGrand* case concerning guarantees and assurances of non-repetition remained applicable. Although the request for those remedies were eventually denied, this third restatement by the Court seems to confirm the customary character of a rule which was considered to amount to a pure exercise of progressive development given the almost inexistence of notable precedents at the time it was under discussion in the I.L.C.. Fourthly, In the *Wall* case (2004)[48], the Court expressly cited Article 25 of the I.L.C.'s Articles (2001) regarding "state of necessity" as a circumstance precluding wrongfulness. The court also deal -although implicitly this time- with article 21 concerning self-defence as a circumstance precluding wrongfulness. It also found implicit support on the I.L.C.'s articles when it enunciated the legal consequences flowing from Israel's construction of the wall in the Occupied Palestinian Territory both concerning Israel's obligations and other States. As far as this latter aspect is concerned, it is worthwhile recalling that the court avoided to mention article 41 of the I.L.C.'s Article although it applied its content to Israel's violation to two categories of obligations "erga omnes" which are commonly seen as being part of the "ius cogens". Finally, it should also be noted that some questions of State responsibility not specifically addressed by the I.L.C.'s related to the responsibility of international organisations[49] did arise in the *Legality of the Use of Force* cases.[50]

2. Consolidation and clarification

[45] See: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) ICJ Reports 2002* in htpp://www.icj-cij.org

[46] Higgins, R., *op.cit.,* (note 36)

[47] See: *Avena and other Mexican Nationals (Mexico v. United States of America), Judment, ICJ Reports, 2004*, p.12

[48] See: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ, Reports, 2004,* p.136

[49] See: Article 57 of the I.L.C's Articles in Crawford J., *op.cit.* (note 11)

[50] See: Yee, Sienho, "The Responsibility of States Members of an International Organization for its Conduct as a Result of Membership or their Normal Conduct Associated with Membership" in *International Responsibility Today, Essays in Memory of Oscar Schachter*(Ed. by Mauricio Ragazzi) Martinus Nijhoff Publishers, pp.435-454

A second likely impact of the I.L.C.'s Articles is the consolidation and clarification of the existing rules of State responsibility and the confirmation of the access of some of its norms to the category of customary law with the consequences that "for the reparation of international wrongs and the restoration of international legality"[51] that is bound to have. The strength of international legality[52] is therefore reinforced by the completion of the Articles on State responsibility, although this reinforcement will be more evidently perceived should the articles be adopted in the form of a multilateral treaty in the future. Nevertheless, the purportedly nature of the I.L.C.'s articles as a step in the making-process of a international convention on this field makes them suitable for testing the doctrine on the relationship between codification treaties and customary international law. This relationship was exemplarily set down by the I.C.J. in the North Sea Continental Shelf[53] and it has been doctrinally expanded to cover texts other than treaties, especially GA normative resolutions. Accordingly, codification treaties may have, as it is well known, three kinds of effects on international customary law:

Firstly, a declaratory effect, meaning that the newly codified norms constitute a restatement of an existing customary law. Chapter I (General Principles, Arts. 29 a 33) and Chapter II (Reparation for Injury, Arts. 34 and 39) of Part Two (Content of the International Responsibility of a State) can be mostly seen as a clear example of this first type of effect. In this sense it has been further suggested that the fact that the I.C.J. made reference to some of Israel's obligations at this regard in *the Wall* case without mentioning any legal ground is a clear indication of their qualification as customary law. Secondly, a crystallizing effect on a rule that was still in a formative stage. This effect could be mostly ascribed to the provisions contained in Chapter II (Countermeasures, Arts. 49 and 54) of Part Three (The Implementation of the International Responsibility of States). The I.C.J. seemingly took note of this fact in the *Gabcikovo-Nagymaros* case when it referred to the conditions that countermeasures must meet in order to be justifiable.[54] Thirdly, a generating effect, meaning that the codification of the rule marks the starting point of the process of formation of a new customary rule of international law. Article 48 (invocation of responsibility by a State other than an injured state) and Article 54 (measures taken by States other than the injured state) can be seen as clear examples of this purportedly generating type of effect. Having said that, it is, however, worthwhile noting than a test of the I.L.C.'s Articles in the light of the relationship between codification treaties and customary law is still -despite its possible indicative value- premature. The legal exam would require a careful analysis of every provision in order to determine its current legal status.

In a nutshell, today it can be argued that the I.L.C.'s articles play the important role of being the reference-point as far as the positive law is concerned even if some of its articles contain aspects of progressive development not yet confirmed by State practice or clear consent. In this respect, it has been also doctrinally raised that the I.L.C.'s

[51] See: Bodansky & Crook , *op.cit* (note 15)
[52] See: Wyler, Eric, "From State Crime to Responsibility of Serious Breaches of Obligations under Peremptory Norms of General International Law" *European Journal of International Law* (2002) Vol. 13 No.5, 1147-1160 at 1160.
[53] See: *North Sea Continental Shelf Cases* (Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands) ICJ Reports,1969, p.3
[54] See: *Gabcikovo-Nagymaros* already referred (note 37)

articles are bound to "clarify and organise legal thinking, planning and state's conduct for the foreseeable future".[55] It is still unclear how and to what extent will this contribute to make some state responsibility emerging norms to trespass the threshold of international legality in each case. However, what appears clear is that the I.L.C.'s articles as annexed in a General Assembly resolution will exert an undeniable "magnetic effect" in that regard. Finally, it is also worth noting that their completion will give a new impetus to other topics which are currently under discussion at the I.L.C. This "bandwagon effect" is clearly exemplified in the field of responsibility of international organisations as revealed by the fact that the Commission is following the general scheme of the Articles on responsibility of states for internationally wrongful acts and has adopted seven articles so far.[56] More doubtful is their impact on the controversial topic of "International liability for injurious consequences arising out of acts not prohibited by international law" which has caused innumerable conceptual difficulties to the I.L.C. since the first "rapporteur" was appointed at its 13th session in 1978.[57] Nonetheless, this brief approach would not be complete without making a more detailed reference to the concept of international crime as it constituted "*la question de fond"* during the doctrinal debate prior and subsequent to the deletion of Article 19.

IV. LOOKING FOR THE INTERNATIONAL CRIME: A CONCEPTUAL HIDE-AND-SEEK

The term "international crime" is definitively today a Stateless notion. More an "individualistic" term than ever, the extent to which this can be seen as symptomatic of the increasing important place occupied by the individual as subject of international law is, however, to say the least, doubtful. In any event, the decriminalisation of state responsibility, which resulted in a conceptual legal abortion within the International Law Commission, has not affected the French, Spanish and Italian languages in the same way. Having distinguished long ago the notion of "crime de droit international" from that of "crime international", the Latin-rooted languages, were in fact, better terminologically prepared for its demise. However, "linguistic pirouettes" aside, the legal differentiation between "international crimes" referred to the field of individual criminal responsibility, and "international crimes" as introduced by the second Special Rapporteur, Roberto Ago, in the works of the I.L.C. on State responsibility in 1976, never presented major difficulties. The International Law Commission itself had, since its very inception, warned in unambiguous terms against the risk of confounding both categories. Moreover, although former Article 19 did simply refer to "international crimes", this term was soon doctrinally completed with the corollary "of States" or even indistinctly referred to by using the related form of "State Crimes". In a nutshell, if the danger of conceptual overlapping was,"minimum" "ab initio", it amounts today to zero. Once the former Article 19 has been deleted from the final Articles on State Responsibility in 2001, there is but only one surviving category of "international crimes", the one corresponding to the French term "crime de droit international".

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[55] See: Rosenstock, R. *op.cit.* (note 8)

[56] See: Report of the ILC on the work of its fifty-sixth session (2004) Chapter V., Responsibility of International Organizations. http.//www.un.org./law/ilc/ sessions/56/56sess.htm#responsibility -of-intl-organisations

[57] See: Chapter VII of the Report of the ILC on the work of its fifty-sixth session (2004) *ref.cit.* (note 54)

Accordingly, the term "international crime" should be today solely used to make reference to those crimes which entail the personal criminal liability of the individuals concerned, the regulation of which can be retraced back to the international crimes of piracy and slavery in the 1800s. As it is well known, the turning-point event in this sub-field was the establishment of the International Military Tribunals at Nuremberg and Tokyo after the 2nd WW which inspired its definitive international legal consecration thanks to the creation of the International Criminal Tribunal for Yugoslavia (ICTY) the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court in the 90s and the International Criminal Tribunal for Sierra Leone (ICTSR) already in the 21st century. Against this background, it is, however, worthwhile noting that a look at the Article 5 of the Rome Statute of the International Court of Justice which address "the most serious crimes of concern to the international community as a whole", shows that those international crimes -the crime of genocide, crimes against humanity, war crimes and the crime of aggression- which give rise to international criminal individual liability under the jurisdiction of the ICC[58] were also addressed in the not exhaustive list of "international crimes" enshrined by former Article 19 of the I.L.C.'s Articles as they are also today arguably cover by Article 40 of the I.L.C.'s Articles as adopted by the General Assembly in 2001. The extent to which further works in the field of individual criminal responsibility would reopen the door for the notion of international crimes of states to re-enter the arena of international law can only be the object of dubious speculation, although some doctrinal voices continue to point out to the complementarity.[59]

Having said that, we shall retake the quotation that has been guiding us through this approach to the Articles on state responsibility and inquiry in the extent to which the withdrawal of former Article 19 should be put in Hobbes' score or whether its substitution by article 40 amounted to a mere cosmetic change as far as its legal consequences are concerned. But before doing so, it should be recalled that former Article 19 was unanimously adopted by the I.L.C. in 1976 and remained completely unmodified up to the adoption by the I.L.C. of the Draft Articles on first reading in 1996. This twenty-year period, which covers the mandates of three special rapporteurs - Roberto Ago (1962-1979), Willen Riphagen (1979-1987) and Gaetano Arangio-Ruiz (1987-1996)- we will call the age of the rise of former Article 19. The appointment of the fifth and last special rapporteur, James Crawford in 1997, who was charged with the mission of completing the second reading by the end of the "lustrum", will mark the age of its fall.

V. A SIMULTANEOUS VIEW OF THE RISE AND FALL OF ARTICLE 19

As telling a minimally detailed and ordered version of the legislative story[60] of the rise and fall of the issue over which "perhaps more ink was spilled throughout the articles'

[58] Except from the crime against the environment which is narrower in scope, See: Article 8.2 of the Rome Statute, 1998

[59] See: Cançado Trindade, Antonio Augusto "Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: the Crime of State Revisited" in *International Responsibility Today, Essays in Memory of Oscar Schachter(*Ed. by Mauricio Ragazzi) Martinus Nijhoff Publishers, 2005, pp.253-269

[60] See: *International Crimes of states: A Critical Analysis of the I.L.C.'s Draft Article 19 on State Responsibility*. Ed. by J.H.H. Weyler, A. Cassese, M. Spinedi, W.de Gruyter, 1989

long history"[61] will go beyond the scope of this work, we opt for approaching origin and end altogether by placing us doctrinally back in the crucial year of 1999. By then, the legal scholarly community was reacting to 1998 professor Crawford's first Report as Special Rapporteur which contained the recommendation of deleting Article 19 and its accessories from the Draft and proposed instead to reach its same results by the alternative route of the special effects of *ius cogens* and *erga omnes* obligations within a unitary regime of responsibility. As it is known, inspired by a distinction already posited by the young Roberto Ago in 1939,[62] during almost half of the 45-year-long drafting story of the ILC's Articles, Article 19 upheld a distinction between simple international wrongful acts -termed delicts- and exceptionally grave international wrongful acts called international crimes. The unanimous acceptance of its incorporation by the ILC was in tune with the legal *imprimatur* which had been recently given to the notions of *ius cogens* and obligations *erga omnes* by the Vienna Convention of the Law of Treaties in 1969 and by the International Court of Justice, respectively, a year later. Each of them is seen as a turning-point event in what professor Abi-Saab has insightfully defined as "the emergence of a backbone for the international legal system"[63] or, in other words, the apparition of a system of "aggravated responsibility" within an international community linked by a complex net of community interests and correlative obligations. The analysis of the existing relationship between these three concepts gave rise to the so-called theory of "three circles"[64] which today should be better named on the basis of its dual character. For the moment being, nonetheless, it would suffice to point out that even those reluctant to accept the existence of an international community would have a hard time finding an argument, as it has been put forward by A.Pellet, to assimilate the legal regime of international responsibility derived from a genocide to that surged from a breach of a bilateral trade agreement.[65]

Knowing that, it is time to briefly review the reasons adduced for the deletion of one of the components of this twenty years famous legal triad. The arguments used against the notion which James Crawford listed first in his list of the three major unresolved problems of the *acquis* of 1996[66] could be classified as follows:

Firstly, criticisms addressed to the text itself of former Article 19 stressed the fact that it contained a circular definition of international crimes and was also incapable of being at the level of precision required by the "nullum crime sine lege principle"; another source of criticism was the "appallingly drafted" paragraph 3 which, in providing for a non exhaustive list of examples in its vocation of not being seen as a "empty box",

[61] Bodansky and Crook *op.cit* (note 15)
[62] Ago, Roberto, *Scritti sulla responsabilità internazionale degli stati*, I, Publicazioni della Facoltà di Giurisprudenza della Università di Camerino, Jovene Editore, 1979 at 141
[63] See: Abi-Saab. G., *op.cit.*, (note 17)
[64] Gaja, G., "Obligations Erga Omnes, International Crimes and Ius Cogens" in *International Crimes of states: A Critical Analysis of the I.L.C.'s Draft Article 19 on State Responsibility.* Ed. by J.H.H. Weyler, A. Cassese, M. Spinedi, W.de Gruyter, 1989
[65] See: Pellet, Alain, "Can a State Commit a Crime? Definitively, Yes!" in *European Journal of International* Law (Symposium: State Responsibility, pp. 339-460) Vol. 10. 1999, pp.425-434
[66] Crawford, J. *op.cit.* (note 11)

plainly strayed the line between primary and secondary rules[67] and introduce multiple confusions. Secondly, criticisms addressed to the legal regime of crimes established by former Articles 51 to 53 , on the other hand, highlighted the rather limited consequences of international crimes (especially, the resistance to include a regime containing any punitive elements at all), its limited integration with the rest of articles in a coherent whole and the complete absence of procedural guarantees associated with them. Thirdly, criticisms addressed to the term itself stressed the risks of analogy with domestic law; this issue of criminalizing international law was portrayed with almost insurmountable difficulties given the present state of an international community of juxtaposed sovereign states understood as primary subjects of a legal order without legislative organised power, superior universal judge or real sanctioning coercive body. It also raised a well defined campaign of criticism, based on political considerations, orchestrated by the governments of the most powerful States.

As it is well known, the cumulative effect of these arguments, but especially, the political repulsion of some powerful states to the maintenance of the term "international crimes" resulted in the eventual deletion of Article 19 and its replacement by Articles 40 and 41 under the heading "serious breaches of obligations under peremptory norms of general international law". However, paradoxically though it may seem in view of the great interest that it had attracted during the legal interregnum of its existence, the abortion of Article 19, and with it the distinction between international crimes and delicts, was, nonetheless, mainly positively welcomed by the doctrine. Should we see it as a late doctrinal recognition that, as the last Special Rapporteur put it, "the idea of international crimes as expressed in the Draft Articles was divisive and had the potential to destroy the project as a whole"?

In order to find an answer to the previous question, it should, perhaps, be advisable, to look back to the following excerpt of the 1976 I.L.C.'s Report which seems to tackle specifically with the underlying question: "*The essential question is not so much whether the responsibility incurred by a state by reason of a breach of specific obligations entails criminal international responsibility, but whether such responsibility is different from that deriving from the breach of other international obligations of the state*". [68] If, accordingly, the original real issue at stake was not the term itself, but the concept behind it (while, on the other hand, as Prof. Abi-Saab put it in his 1999's defence of the maintenance of the term, the issue of the existence or possibility of a criminal responsibility of states in international law a parallel but separate issue), then the question that must be answered is the extent to which the final I.L.C.'s articles upheld the existence of a system of aggravated responsibility which would replace that established by the defunct article 19. Was that the case? "Definitively,Yes!"[69] as Professor Alain Pellet who, incidentally, conclude its reaction to that change by writing *"Le crime international de l'Etat est mort? Vivent les violations graves des obligations découlant de normes impératives du droit international général ! Cela revient*

[67] As it is well known, primary rules of international law are those customary or treaty rules laying down substantive obligations for States; secondary rules are rules establishing a) on what conditions a breach of a primary rule may be held to have occurred and b) the legal consequences of this breach

[68] I.L.C. Yearbook (1976, II, Part 2) 118

[69] See: Pellet, *op.cit.* (note 63)

exactement au même... »[70] would have put it. In fact, the majority of the doctrine saw the replacement of Article 19 by Article 40 as keeping alive the concept behind the term. In other words, the "signified" survived the "signifier", the *negotium* prevailed over the disappearance of its original *instrumentum* to be enshrined in other form which was substantially respectful of its original intent. If we accept, therefore, as professor Eric Wyler has put it, that "*the murder of crime does indeed look innocent*" because, in fact, Article 40 is the "twin brother" of former Article 19, there seems to be some room to speculate (when reviewing the scene in retrospect) that the whole notion of "State crimes" eventually (whether unintentionally or not would be for Roberto Ago to answer) played the role of a " linguistic scapegoat" in the accession of an system of aggravated responsibility to the level of recognised category of contemporary international law. And that amounts to a point in Kant's score and a victory for the paradigm that this figure represents. The extent to which it can also be considered a "noteworthy retreat suffered by Hobbes" is, however, highly debatable.

VI. AS A WAY OF CONCLUSION

In his remarkable contribution to Gaetano Arangio Ruiz's Mélanges, Karl Zemanek[71] draws a comprehensive picture of the advantages and disadvantages of codification in treaty form and finish by favoring, in the end, the code-of-conduct-option "as the best means to consolidate the law of State responsibility". Although his writing should be contextually placed at the time the I.L.C. was debating the best way to deal with the solution of "the-form-of-the-articles-question" that it will propose to the General Assembly and should, therefore, be seen as an unveiled defense of the two-stage approach eventually endorsed, most of his insights possess have a long-standing resonance and should, therefore, be summarily recalled.

As for the advantages of codifying international law in the form of a multilateral treaty it should be, primarily, pointed out, that the codified instrument would be subject to the law of treaties codified in the Vienna Convention. From that it ensues, viz. that the parties would possess a more reliable knowledge of the scope of their rights and obligation than that provided by customary law; that excuses related to the restriction upon the parties by viz. domestic law will follow under the disproving effect of article 27 of the Vienna Convention; that supplementary consequences would bring to bear upon defaulting States according to Article 60. A second fundamental consequence deriving from codification in treaty form is that the uncertain legal status of a "soft law" codification would be avoided. To this it should be added that a convention on the field would entail the establishment of a dispute settlement mechanism in the field of State responsibility responding likewise to its perceived need by States.[72] As for the

[70] See: Pellet, Alain, "Le nouveau projet de la C.D.I. sur la responsabilité de l 'Etat pour fait internationalement illicite : requiem pour le crime ? » in *Man's Inhumanity to Man, Essays on International Law in Honnour of Antonio Cassese*, Kluwer Law International, 2003, pp. 655-684. For an English version of the same text, See: Pellet, Alain, "The New Draft Articles of the International Law Commission on the Responsibility of States for International Wrongful Acts: a Requiem for States' Crime? *Netherlands Yearbook of International Law*, Vol. XXXII, 2001, pp.55-79

[71] Zemanek, Karl, "Appropriate Instruments for Codification: reflections on the ILC Draft on State Responsibility", in *Studi di Diritto Internazionale in Onore de Gaetano Arangio-Ruiz* (Vol.II), Editoriale Scientifica, 2004, pp.897-918

[72] See : Crawford, J., *op.cit* (note 11) pp.59-60

disadvantages one should recount, at least, the following ones closely related to the "decodifying-effect" risk: the disappointing record of ratifications and accessions to previous codification conventions, the dangerous effects of both reservations and amendments in a systematically constructed draft in which provisions are closely interrelated; the redrafting risks involved in a diplomatic conference of plenipotentiaries in which the text is negotiated and finally adopted article by article. It was, furthermore, argued that a code of conduct "would offer greater flexibility and would allow for a continued process of legal development"[73] and there was not much interest in fixing within a treaty a text which has already a determinant influence on the conduct of States and does not even leave the International Court of Justice indifferent.[74]

Against this background, when more than 4 years have already elapsed since the General Assembly adopted the I.L.C.'s Articles, the question remains whether the doctrinal voices that defended the convenience of having a code of conduct as the best solution in the short run now continue to favor this choice for the long-run as well. In view of the General Assembly's second "*rendez vous"* with the I.L.C.'s Articles in 2007, those voices would do, perhaps, well to begin reconsidering its conservationist-oriented "temporary" positioning, should they do not wish to risk that, just one step before leaving the Hades, the I.L.C.'s Articles vanish as Eurydice did under the sorrowful eyes of Orpheus.

[73] *Ibid.*

[74] Pellet, A., « La codification du droit à la responsabilité internationale : tâtonnements et affrontements » *in The International Legal System in Quest of Equity and Universality, Liber Amicorum Georges Abi-Saab,* , Kluwe Law International, 2001, pp.285-304