Fault in the Law of State Responsibility – Pragmatism *ad infinitum?*

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A. Introduction

In its Commentaries to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, the International Law Commission (ILC) declared the role of fault within the law of State responsibility to be a matter "for the interpretation and application of the primary rules engaged in a given case."[1] This statement raises the question whether the old debate on the "nature" of State responsibility has been overcome (B.). It is correct insofar as there is no longer a fundamental debate whether State responsibility is responsibility for fault or risk responsibility. The old debate, however, reappears in disputes arising in the context of the interpretation of primary rules. This paper explores the causes of the present – rather unclear – situation (C.) and its consequences (D.). Three main causes are identifiable, namely the pragmatism of the ILC's work on State responsibility, the inconsistency of the jurisprudence in the field, and the heterogeneity of the topic. The consequences of the ILC's approach are twofold. First, difficulties arise regarding the application of primary rules that do not contain precise and express requirements relating to fault. The old theories on the "nature" of State responsibility can in this context play a role in finding adequate solutions. Second, the ILC's approach has an impact on the tasks of law-making institutions. These institutions are essentially required to

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[1] Commentaries to the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, GAOR, 56th Sess., Suppl. 10, 59, 70. For the legal status of the Draft Articles see *David D. Caron*, The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority, AJIL 96 (2002), 857, 857 *et seq.*

establish which role should be attributed to fault for every primary rule separately.

B. General Considerations

I. A Settled Debate?

At first sight, the ILC's eventual handling of the problem of fault within the law of State responsibility is marked by a certain simplicity and elegance. While the Draft Articles on the Responsibility of States for Internationally Wrongful Acts – apart from a few hidden references – remain silent, the Commentaries to the Articles declare the topic a matter "for the interpretation and application of the primary rules engaged in a given case."[2] The ILC avoided a clear decision on the topic, which had been debated for several decades. A consensus was always out of reach, and any other approach would have met with much stronger opposition. The requirements relating to mental elements – fault, intent, negligence, or disregard of due diligence[3] – must be found by interpreting the primary rules.

The ILC's approach appeared to end a debate that was not only long-lasting but also tiresome. It was an ideological debate that consumed considerable energy of the authors and the rapporteurs concerned with the topic. Discussing the "nature" of State responsibility – *i.e.* whether it is in essence risk responsibility or responsibility for fault – was an abstract discussion in which the fundamental positions were highly dependent on ideological assumptions that were difficult to prove. Such discussions often seemed of limited practical relevance for the codification project. The ILC's approach therefore nurtured hopes that the old debate had finally been overcome. By omitting the "big questions," would future discussions about this topic be more about finding adequate solutions to concrete problems?

The suggestion here is that this has proven to be only partly the case. A closer look reveals that the problem is far more complex than it appears at first

[2] *Ibid.*

[3] Responsibility for disregard of due diligence is an objectivized variant of responsibility for fault. See, *inter alia*, *Karl Zemanek*, Schuld- und Erfolgshaftung im Entwurf der Völkerrechtskommission über Staatenverantwortlichkeit, in: *Emanuel Diez et al.* (eds.), Festschrift für Rudolf Bindschedler (1980), 315, 330.

sight. The ILC's approach has undeniably ended the debate insofar as the topic is no longer within the scope of the secondary rules. These rules contain only a few hidden references to subjective elements[4] – mainly in the articles dealing with *force majeure* and unforeseen events (Art. 23), distress (Art. 24), and necessity (Art. 25) in the chapter on "circumstances precluding wrongfulness."[5] They do not, however, include any general rule concerning mental requirements. Whether a specific rule establishes responsibility for fault or risk responsibility must still be established for every single primary rule separately.

This is not, however, to imply that the old debate is no longer relevant. Many primary rules are completely silent about the mental requirement. Often a certain conduct or effect is proscribed but the issue of fault remains unaddressed.[6] These rules demand "extensive interpretation," the mental element has to be determined by way of interpretation. Calling the process of determining the specific requirement in such a situation "interpretation" is, however, highly formalistic. The margin of discretion is extremely wide and brings the process of applying the law close to law-making. To give but one example, Art. 25 of the Vienna Convention on Diplomatic Relations[7] requires the receiving State to accord full facilities for the performance of the functions of a diplomatic mission. The wording obviously does not state whether the rule establishes responsibility for fault or risk responsibility. In practice, it seems that the rule establishes responsibility for disregard of due diligence; its wording, however, offers no indication.[8] Determining the role of fault in such

[4] Subjective elements – unlike justifications – are circumstances on the part of the injuring State over which the injured State has no influence.

[5] The adequacy of the concept of this chapter and its terminology have been questioned repeatedly. See, *inter alia*, *Andrea Gattini*, Zufall und *force majeure* im System der Staatenverantwortlichkeit anhand der ILC-Kodifikationsarbeit (1991), 43 *et seq.; Bruno Simma*, Grundfragen der Staatenverantwortlichkeit in der Arbeit der International Law Commission, AVR 24 (1986), 357, 381. According to *Robert Rosenstock*, the Commission's work in this chapter reflects the "triumph of pragmatism over pure logic:" *Robert Rosenstock*, The ILC and State Responsibility, AJIL 96 (2002), 792, 794.

[6] *Ian Brownlie*, State Responsibility (1983), 38.

[7] Vienna Convention on Diplomatic Relations, 18 April 1961, UNTS 500, 95

[8] If the rule were considered as establishing risk responsibility, the receiving State would also be responsible in situations in which it had taken all measures it reasonably could be expected to take. See also the example given by *Zemanek* (note 3), 326, relating to Art. 22 of the Vienna Convention on Diplomatic Relations. The contradictions in the work of the ILC – which was undecided between strict liability and liability for disregard of due diligence – reflect the problem described here.

situations is impossible without – implicit or explicit – reference to considerations of a general nature that are, strictly speaking, not based on the rule itself. In this context, the considerations that played a role in the old debate on the "nature" of State responsibility may be helpful in finding adequate "interpretations" of the primary rule.[9]

Before the problem is discussed in more detail, it should be understood that the omission of a topic as classic as fault from the Draft Articles is surprising.[10] Its inclusion would have at least at first sight fit the ambitious aim of the undertaking, namely to provide a general framework and "complete tool kit"[11] for dealing with internationally wrongful acts, as well as the abstract approach adopted by the ILC, sometimes called "continental." In addition, the first special rapporteur of the undertaking's "second phase," *Roberto Ago,* was known as an emphatic proponent of the "fault theory." *Ago* was generally expected to introduce the "fault concept" into the Articles.[12] Providing a general framework does not, however, necessarily mean addressing *all* topics of general interest. On the contrary, it requires carefully distinguishing between issues suitable and unsuitable for generalization.[13]

II. Aim of this Contribution

The aim of this paper is to outline the causes of the present rather unclear situation concerning fault and the main consequences of this situation. The matter of fault is in practice dealt with by what may be called a "principle-free pragmatism." The consequences of the approach adopted by the ILC are largely unexplored. The following remarks are made in full cognizance of the fact that

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[9] *Infra,* D.I.

[10] *Gattini* (note 5), 44; *Zemanek* (note 3), 322.

[11] *Vaughan Lowe,* Precluding Wrongfulness or Responsibility: A Plea for Excuses, EJIL 10 (1999), 405, 405.

[12] Before taking up his position as a special rapporteur, *Roberto Ago* examined the topic of fault in several publications, above all in: Le délit international (1939), 62 *et seq. Andrea Gattini* believes that the central role given to fault in State responsibility by *Ago* is concealed in *Ago*'s article on *force majeure* and unforeseen events: *Andrea Gattini,* Smoking / No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility, EJIL 10 (1999), 397, 401.

[13] Accordingly, the Draft Articles contain only necessary but not sufficient conditions for the imposition of responsibility: *Brownlie* (note 6), 40.

practice – *i.e.* foreign ministries and international tribunals in their work – often finds adequate solutions on a purely empirical basis.[14]

C. Causes of the Present Situation

I. The ILC's Working Method

The first reason for the ILC's decision not to deal with fault in the secondary rules of State responsibility has to do with its working method. The codification process from the beginning of the "second phase" in the early 1960s was characterized by a disciplined pragmatism.[15] This approach was due, on the one hand, to its ambition to cover international law in its entirety and, on the other, to the urge to maximize consensus on the final outcome.[16] Limiting the undertaking to rules apparently suitable for generalization was essential to reaching a politically acceptable result.[17] As successful as this approach was politically, it entailed unwelcome side effects: political acceptability was put before dogmatic consistency.

Particularly noteworthy and prominent in this context is the chapter on "circumstances precluding wrongfulness." This chapter provides exceptions to the principle that *every* internationally wrongful act entails responsibility. It does not, however, distinguish between justifications (*Rechtfertigungsgründe*) and some clearly defined specific subjective circumstances on the part of the injuring State ("excuses;" *Schuldausschlussgründe*). Accordingly, it does not take into consideration that in the former case, the act itself is not wrongful, whereas in the latter, the act remains wrongful, but does not entail responsibility. The consequences of the ILC's "generous" approach become apparent when, for example, an international obligation is jointly breached by two States, one of which acts under necessity (Art. 25). According to the ILC's approach the same act is at the same time wrongful and not wrongful – a

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[14] *Ibid.*, 35.

[15] For the first phase see *Simma* (note 5), 360 *et seq.*

[16] *James Crawford* laconically noted that fault is not a topic that the ILC was compelled to address: *James Crawford*, Revising the Draft Articles on State Responsibility, EJIL 10 (1999), 435, 438.

[17] The work was concluded, according to *David C. Caron*, with a "minimum of diplomatic bloodshed." See *Caron* (note 1), 857.

characterization that is logically impossible. Another important inconsistency in the Draft Articles is the main concern of this paper, namely that the ILC declares the question of fault to be a matter for the interpretation of the primary rules concerned in a given case, regardless of the fact that many primary rules cannot be so interpreted. In such cases, pragmatism means delegating the problem to practice or jurisprudence without considering the burden thereby put on judicial or other institutions applying the law.

II. Jurisprudence

The second reason for not including the topic into the Draft Articles is the inconsistency of the jurisprudence in the field. Jurisprudence has always been varying, international courts and arbitration tribunals have mostly been unwilling – or at least unable – to address the matter in a principled manner. This contrasted to some extent with the jurisprudence regarding State responsibility generally, which was relatively uniform since the *Factory at Chorzów* case in the inter-war era.[18] A selection of leading cases from various fields and decades helps illustrate this inconsistency.

In the *Youmans Claim* (1926) – an early and important authority concerning the protection of foreigners –, the Claims Commission paid little attention to the problem of fault.[19] The case concerned the failure of the Mexican government to protect a foreigner from the fury of a mob. In its decision, the Commission laconically stated that Mexico's "lack of diligence" to protect the foreigners was essential for the imposition of State responsibility.[20] The precise role of fault remained unclear, but the general approach contrasted sharply with that taken in the *Trail Smelter Arbitration* (1941).[21] In this arbitration, which concerned air pollution emissions by private Canadian actors that affected the United States, Canada was held to be responsible solely because it had breached its obligation not to allow the use of its territory in such a way as to cause injury

[18] PCIJ, *Factory at Chorzów* (Germany *v.* Poland), Merits, Judgment of 13 September 1928, Series A, No. 17.

[19] *Thomas H. Youmans (U.S.A.) v. United Mexican States* (1926), RIAA 4, 110.

[20] *Ibid.*, paras. 12 *et seq.*

[21] *Trail Smelter Arbitration* (United States of America *v.* Canada) (1938), RIAA 3, 1911 and (1941), RIAA 3, 1905.

in or to another State's territory.[22] The possibility of exculpation was not taken into consideration by the tribunal, and the question of fault was not addressed.

A very different role was attributed to fault in another leading case, namely the *Corfu Channel* case (1949).[23] The case concerned the laying of mines by private actors in Albanian coastal waters; in terms of the law, the Court had to determine Albania's legal obligations flowing from its control of the territory.[24] Taking Albania's knowledge of the mine-laying as established, the ICJ regarded its failure to prevent it as a breach of international law by omission. It held that every State was under a duty "not to allow knowingly its territory to be used for acts contrary to the rights of other States."[25]

The approach taken in *Corfu Channel* is in turn hard to reconcile with the one taken in the *Case concerning United States Diplomatic and Consular Staff in Tehran* (1980), where the State organs concerned remained passive as well.[26] In this leading case, the Iranian State organs knew of the wrongful conduct of private actors. The topic of fault, however, was not addressed in the ICJ's judgment.[27] This may have been due to the fact that the exact role of the State was unclear and that providing evidence would have raised almost insurmountable problems.

The last case worthy of mention here is the *Case concerning the Gab…íkovo-Nagymaros Project* (1997).[28] The topic of fault in this case – which concerned breaches of a treaty regulating the construction and operation of locks by Hungary and Slovakia – was once more left undiscussed. The ICJ's judgment is unclear as to whether some form of fault had been taken to be relevant and established.

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[22] *Trail Smelter Arbitration* (United States of America *v.* Canada) (1938), RIAA 3, 1938, 1965 *et seq.*

[23] ICJ, *Corfu Channel* (United Kingdom *v.* Albania), Merits, Judgment of 9 April 1949, ICJ Reports 1949, 4.

[24] *Ibid.*, 22.

[25] *Ibid.*

[26] ICJ, *United States Diplomatic and Consular Staff in Tehran* (United States of America *v.* Iran), Merits, Judgment of 24 May 1980, ICJ Reports 1980, 3.

[27] *Ibid.*, para. 67.

[28] ICJ, *Gab…íkovo-Nagymaros Project* (Hungary *v.* Slovakia), Merits, Judgment of 25 September 1997, ICJ Reports 1997, 7.

III. Substance of the Issue

The third and main reason for omitting the topic from the secondary rules is its heterogeneity. During the codification process, the idea of devising a general rule concerning fault was repeatedly criticized as overly ambitious by distinguished authors.[29] According to *James Crawford,* the last special rapporteur, there simply exists no general rule, principle, or presumption about the place of fault.[30] The topic was considered too heterogeneous to be governed by a single rule.

Analogies between international law and municipal law are generally problematic. They may, however, be helpful in illustrating a specific problem.[31] The various fields covered by primary rules in international law correspond to fields in municipal law as distinct as civil law, penal law, procedural law, administrative law, and constitutional law. For example, there are analogies between many rules on State territory and civil law rules on neighborhood. International criminal law like municipal penal law aims to impose criminal sanctions on individuals. Treaties on dispute settlement deal partly with traditional problems of procedural law. Rules concerning the activities of treaty bodies or organs of international organizations such as their working procedures may be called international administrative law, thereby adopting a term from municipal law. Finally, the most fundamental rules of international law have functions in some sense similar to the basic principles of national constitutional law.

A further aspect of the problem of heterogeneity should be mentioned. The circumstances for providing evidence for fault vary considerably in the different fields of primary rules. In some, there are structural obstacles. For example, if an airplane intrudes temporarily into the airspace of another State, the injuring State exclusively "controls" the relevant facts relating to fault. In other fields, providing proof does not raise particular problems. For example, if a State does not fulfil its legislative obligations relating to racial discrimination, fault is obviously established.

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[29] See *Brownlie* (note 6), 40.

[30] *Crawford* (note 16), 438.

[31] Another *Crawford* remark is worth mentioning, namely that State responsibility is neither civil nor criminal, but purely and simply international: *James Crawford,* First Report on State Responsibility, UN Doc. A/CN 4/490/Add. 1 (1998), para. 60.

D. Consequences of the Approach Adopted by the ILC

I. Application of Primary Rules

The ILC's approach has two principal consequences, which relate to the application of primary rules on the one hand and law-making on the other.

As regards the application of primary rules, two situations must be distinguished. The first concerns interpretation in the strict sense, whereas the second relates to norms that are silent with respect to the mental element. Interpretation in the strict sense is required only of rules whose wording contains explicit requirements relating to fault, negligence, or due diligence – or if the wording explicitly provides for strict liability.

In these situations, determining the precise requirements means concretizing decisions contained in the rule itself. Put otherwise, the wording is the starting-point and basis of the interpretation process. It often provides a clear answer. For example, Art. 30 of the Statute of the International Criminal Court[32] provides that criminal responsibility for international crimes can only be imposed on an individual who commits a crime with intent and knowledge. Another example is the rule that prohibits the expropriation of foreign property in retaliation or in the form of a political reprisal.[33]

The second situation as regards the application of primary rules was described in the introduction. It concerns primary rules whose wording remains silent with respect to fault. Whether these rules establish risk responsibility or responsibility for fault cannot be determined by a literal interpretation. The duty to grant innocent passage in the law of the sea, for example, or the obligation to provide adequate police protection to foreigners do not offer any such indication. Arts. 21, 22, 24, 25, and 26 of the Vienna Convention on Diplomatic Relations are also silent. Most primary rules contain no specific requirements relating to fault. They seem to have been drawn up under the assumption that determining the precise role of mental elements is not the task of drafters of primary rules.

How can the fault requirements be determined in such cases as rationally and transparently as possible? The answer proposed here consists of three elements.

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[32] Rome Statute of the International Criminal Court, 17 July 1998, UNTS 2187, 3.

[33] *Brownlie* (note 6), 46.

First, transparency requires *giving reasons* for the role attributed to fault or for assuming risk responsibility. Not to address the question of fault conflicts with the Draft Articles' aim of improving the reliability of the law of State responsibility. Most decisions of international courts or arbitration tribunals – as the above survey illustrates – remain unclear in this regard. Second, giving reasons requires a thorough *analysis of the context* of the primary rule concerned. Determining the required standard must take into account various factors such as the principles underlying the respective field of international law, the relevance of the field for international stability, the connection between the rule engaged and related rules, and the circumstances for providing evidence. There is obviously a wide margin of discretion. Third, the considerations that played a role in the old debate on the "nature" of State responsibility can be helpful in determining the appropriate concept of responsibility in a given case. Each of the theories is connected with a series of assumptions about the aims of State responsibility. This problem analogously arises in the context of the interpretation of primary rules not containing explicit requirements.

The assumptions of the main theories on the nature of State responsibility may now be usefully, if somewhat simplistically, outlined. The theory that has prevailed in the last decades is the risk responsibility concept or the objective responsibility theory.[34] It assumes that the ultimate aim of the law of State responsibility, in keeping with trends in domestic legal thinking,[35] is to contribute as much as possible to legal stability, clarity, and predictability. It is also based on the fact that providing proof in international law is confronted with extreme structural difficulties, including exclusive control by States of territory and the lack of mandatory judicial institutions. The second theory worthy of mention – which was more popular in earlier decades than nowadays – is the fault theory or the subjective responsibility theory.[36] It is based on the

[34] Proponents of the risk responsibility theory include the following: *Dionisio Anzilotti*, Teoria della responsibilità nel diritto internazionale (1902); *Paul Guggenheim*, Traité de Droit international public (1954), 50 *et seq.; Ignaz Seidl-Hohenveldern/Torsten Stein*, Völkerrecht (11th ed. 2005), 442; Decisions of international courts and arbitration tribunals supporting this theory include the *Caire Claim* (1929), RIAA 5, 575; the *United States Diplomatic and Consular Staff in Tehran* (note 26).

[35] *Gattini* (note 12), 397.

[36] Proponents of the fault theory include the following: *Hersch Lauterpacht*, Private Law Sources and Analogies of International Law (1927), 134 *et seq.; Ago* (note 12), 62 *et seq.; Karl Strupp*, Éléments du droit international public, universel, européen et

assumption that the fault principle is essential to every legal system. According to this theory, the requirement of fault relates to the idea of justice. No particular attention is paid to the problem of providing proof and to the lack of mandatory judicial institutions.[37] The third concept is a compromise between the first and the second which tries to combine the advantages of both. In its dominant variant, it provides risk responsibility for breaches of international law arising from active conduct and fault responsibility for breaches by omission.[38] This concept derives from the idea that the law of State responsibility must balance stability and clarity with respect for relevant social circumstances. By providing strict liability for active conduct, it takes account to some extent of the fact that providing evidence is "the real stumbling block"[39] in any theory of fault. The priority that this concept accords to breaches of international law by active conduct over those by omission is, however, difficult to justify in principle. It is obviously motivated by pragmatic considerations.

How these theories can help in the interpretation of "silent" primary rules may be explained by the following illustration. The rule that States must provide adequate police protection to foreigners does not contain explicit requirements relating to fault.[40] In order to address that question, it is necessary to examine the rule's context. This "interpretation" first of all has to take account of the basic principles and considerations underlying the legal rules governing the protection of foreigners. This field of international law arguably aims at obliging States not to abuse their power with regard to foreigners and at avoiding tensions between States. It is, in other words, concerned with the problem of discrimination of individuals and the problem of preservation of international stability. Providing evidence in this field can be very difficult as

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américain (1930), 330. Authorities supporting the fault theory include: *Home Missionary Society Case* (1920), RIAA 6, 42; *Award of Wal-Wal Incident* (1935), RIAA 3, 1657; *Pugh Claim* (1933), RIAA 2, 1439.

[37] The fault theory is related to the "materialization" of international law in the twentieth century, particularly to the renunciation of its moral neutrality and to the rise of the individual as subject and object of international law.

[38] Proponents of this theory include the following: *Zemanek* (note 3), 322 *et seq.; Brownlie* (note 6), 45; *Pierre-Marie Dupuy*, Le fait générateur de la responsabilité des États, RdC 188 (1984), 9, 37. The main authority supporting this theory is the *Corfu Channel* case (note 23), 22.

[39] *Gattini* (note 12), 402.

[40] See the *Youmans Claim* (note 19).

the facts are "controlled" almost exclusively by the injuring State. Furthermore, there is, in principle, no mandatory judicial institution in this field. Taking these factors into account, it seems reasonable to regard either the compromise concept, the third theory outlined, or the risk responsibility rule, the first, as an adequate solution. Consideration of the problem of stability, which is obviously connected to this field, suggests, however, that the compromise concept should be preferred. The rules on the protection of foreigners do not aim to establish a kind of insurance for foreigners, but to prevent intentional abuse of State power. The concept of responsibility for fault, the second theory, would in contrast entail serious practical problems.

II. Law-making

The second consequence of the ILC's approach concerns law-making. It is far-reaching. By excluding the topic of fault from the scope of secondary rules, the tasks of institutions and bodies concerned with drafting primary rules are expanded. They can no longer avoid taking a decision on the precise requirements relating to fault. Finding an adequate solution to this problem becomes part of the working program of law-making bodies.[41] Current ILC codification projects such as those on diplomatic protection or shared natural resources must take this reality into account. Drafting primary rules thereby becomes more complex and agreement on the final outcome more difficult to reach in some cases.

E. Concluding Remark

The problem of determining the role of fault in the law of State responsibility is the necessary and unavoidable consequence of the decision taken by the ILC in the early 1960s to construct a single, general framework for dealing with State responsibility for internationally wrongful acts. Its approach, which sought to enhance the stability and predictability of international law in general, also brings with it a number of disadvantages relating to fault. International

[41] This situation does not necessarily imply that law-making bodies cannot decide to leave the question unanswered and to "delegate" the problem to practice. If so, the problems described above arise anew.

courts and arbitration tribunals interpreting primary rules which remain silent on the matter are authorized with near legislative powers. This is problematic from the perspective of democratic legitimacy – the *Achilles*' heel of international law. There are, however, ways of mitigating such problems, as outlined in this paper.