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Edith Brown Weiss

Georgetown University Law Center, weiss@law.georgetown.edu

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Professor of Law

Georgetown University Law Center

weiss@law.georgetown.edu

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INVOKING STATE RESPONSIBILITY IN THE TWENTY-FIRST CENTURY

By Edith Brown Weiss*

At the beginning of the twenty-first century, the international community is globalizing, integrating, and fragmenting, all at the same time. States continue to be central, but many other actors have also become important: international organizations, nongovernmental organizations, corporations, ad hoc transnational groups both legitimate and illicit, and individuals. For the year 2000, the *Yearbook of International Organizations* reports that there were 922 international intergovernmental organizations and 9988 international nongovernmental organizations.¹ If organizations associated with multilateral treaty agreements, bilateral government organizations, other international bodies (including religious and secular institutes), and internationally oriented national organizations are included, the number of international organizations reaches nearly thirty thousand.² Another twenty-four thousand are listed as inactive or unconfirmed.³ Corporations that produce globally are similarly numerous. As of September 27, 2002, an estimated 6,252,829,827 individuals lived on our planet.⁴ Some of these individuals and groups have made claims against states for breaching their obligations, particularly for human rights violations. In short, international law inhabits a much more complicated world than the one that existed fifty or even thirty years ago.

The Peace of Westphalia more than 350 years ago led to the establishment of the classic system of international law, which centered exclusively on sovereign states that had defined territories and were theoretically equal. States made international law and were accountable to each other in meeting international legal obligations. The articles on state responsibility of the International Law Commission (ILC)⁵ largely reflect this traditional view of the international legal system. They focus on states and the rules they use to hold each other accountable for the substantive obligations to which they have committed themselves.

But the initial ILC report in January 1956 observed that it was important to do more than codify the law; it was "necessary to change and adapt traditional law so that it will reflect the profound transformation which has occurred in international law. . . . [and] to bring the 'principles governing State responsibility' into line with international law at its present stage of development."⁶ During the almost fifty years since the United Nations General Assembly

* Of the Board of Editors. The author thanks James E. Donnelly of the Georgetown University Law Center for research assistance and Jane Stromseth for comments.

¹ 2001/2002 Y.B. INT'L ORGS. 15.

² *Id.* The *Yearbook's* data base codes international bodies according to fifteen types of organizations and then groups them into five clusters: international organizations; dependent bodies; organizational substitutes; national bodies; and dead, inactive, and unconfirmed bodies.

³ *Id.*

⁴ U.S. Bureau of the Census, Projections of the International Programs Center (May 10, 2000), at <<http://www.census.gov/cgi-bin/ipc/popclockw>>.

⁵ Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at <<http://www.un.org/law/ilc>>, reprinted in JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002). References to, and quotations of, the articles, as well as the official ILC commentaries to the articles, which appear in the Commission's Fifty-third Report and Crawford's volume, *supra*, will be identified below by article and paragraph number.

⁶ F. V. García-Amador, State Responsibility, [1956] 2 Y.B. Int'l L. Comm'n 173, 176, para. 10, UN Doc. A/CN.4/SER.A/1956/Add.1.

adopted the resolution that authorized the Commission's work on state responsibility,⁷ the international legal system has evolved significantly to reflect the changing nature of international society and the growing role of nonstate actors. While the Commission's almost exclusive concern with states may have been appropriate at the beginning of its work, it does not reflect the international system of the twenty-first century.

This essay reviews the articles on the invocation of state responsibility, analyzes them in historical context, and notes where they represent progressive development of international law. It then surveys a wide range of contemporary situations where individuals, other nonstate entities, and international organizations invoke state responsibility by initiating judicial or other formal complaint proceedings. The essay concludes that, in light of this contemporary practice, the articles usefully advance the codification and development of international law but do not deal sufficiently with the right of individuals and nonstate entities to invoke the responsibility of states.

I. THE ILC ARTICLES ON INVOKING STATE RESPONSIBILITY

The articles on state responsibility are organized into four parts, two of which directly bear on the issue of "who can claim" addressed in this essay. The key provisions are in part 3 (implementation of international responsibility) and, to a lesser extent, part 2 (the content of international responsibility). Parts 1 and 4 (the elements of internationally wrongful acts, and certain general provisions) are less relevant.

Part 3, "The Implementation of International Responsibility of a State," illustrates the articles' central focus on states as holding rights that potentially implicate state responsibility. Chapter I of part 3, which addresses who can claim a breach of state responsibility, limits the text to invocation by states. The first article (Art. 42) is characteristic: "A State is entitled as an injured State to invoke the responsibility of another State"⁸ The introductory commentary to the chapter observes that the "rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33(2),"⁹ which is located in part 2 (articulating the consequences of internationally wrongful acts). This "savings clause" provides only that part 2 does not prejudice any right arising from a state's international responsibility that accrues directly to an individual or nonstate entity.¹⁰ While this clause at least acknowledges today's more complicated world, it is insufficient. The chapter on invocation should also have addressed, however briefly, the capacity/powers of persons, nonstate entities, and international organizations to invoke the international responsibility of states.¹¹ This point will be dealt with more fully after analyzing the articles on invocation that the International Law Commission has put forward.

An Overview of the Articles

Chapter I (of part 3) on invocation contains seven articles, Articles 42–48. Article 42 addresses invocation of responsibility by an injured state, while Article 48 turns to invocation of responsibility by a state other than an injured state. This is an important and potentially

⁷ GA Res. 799, UN GAOR, 8th Sess., Supp. No. 17, at 52, UN Doc. A/2630 (1953).

⁸ Art. 42.

⁹ Commentary to pt. 3, ch. I, para. 1.

¹⁰ Art. 33(2).

¹¹ James Crawford, the last rapporteur, is certainly aware that the international community includes important actors other than states. In his excellent introduction to the articles and commentary, he notes that "[t]he international community includes entities in addition to States, for example, the United Nations, the European Communities, the International Committee of the Red Cross. Clearly there are other persons or entities besides States towards whom obligations may exist and who may invoke responsibility for breaches of those obligations." CRAWFORD, *supra* note 5, at 41.

controversial distinction, which is discussed below. The articles in between, Articles 43–47, deal with procedural aspects of the invocation of state responsibility: the obligation to provide notice of a claim, the admissibility of claims (requirements concerning nationality of claims and exhaustion of local remedies), the loss of the right to invoke responsibility, the ability of a plurality of states injured by the same “internationally wrongful act” to make claims, and the rights of invocation when there are a plurality of responsible states.¹² The first three of these articles apply equally to states invoking responsibility as an injured state or as a non-injured state.

Articles 43–47 generally codify international law and are relatively straightforward. However, Articles 45, 46, and 47 deserve special note. Article 46 (plurality of injured states) and Article 47 (plurality of responsible states) were added in the year 2000 after the draft articles were adopted on first reading. They make clear that if there is a plurality of injured states or a plurality of responsible states, each one is entitled to make a claim against any responsible state subject to the limitation that no injured state may recover compensation exceeding its damages. Since problems such as environmental protection usually engage more than one injured state and more than one responsible state, Articles 46 and 47 may be especially useful. Article 45 addresses when a state may lose the right to invoke state responsibility, namely, by waiving its claim or by conduct indicating that it has “validly acquiesced in the lapse of the claim.”¹³ The last condition gives considerable flexibility to a court in determining whether the right has been lost and, as the commentary indicates,¹⁴ reflects the somewhat varying judgments on this point of the International Court of Justice (ICJ) in the *Certain Phosphate Lands in Nauru*¹⁵ and *LaGrand* cases.¹⁶

Definition of Invocation

The articles define “invocation” narrowly. The commentary to Article 42 indicates that the term “should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal.”¹⁷ Protests, criticisms, or calls for other states to abide by an obligation do not by themselves qualify as “invoking” the responsibility of a state under Article 42. However, claims before intergovernmental human rights commissions, for example, or before other intergovernmental bodies should suffice. While the ILC may have defined invocation narrowly, the articles are likely to be applied when states make less formal claims of international law violations. On the other hand, by keeping the definition narrow, the Commission may have intentionally left undisturbed the right of “non-injured” states to make less formal claims that a state has breached its international obligations, as well as any rights of individuals and nonstate entities to make less formal claims.

II. WHO MAY INVOKE STATE RESPONSIBILITY UNDER THE ARTICLES

Historically, there has been considerable jurisprudential disagreement as to whether international agreements create only bilateral obligations between pairs of individual states,

¹² Arts. 43–47, respectively.

¹³ Art. 45(b).

¹⁴ Commentaries, Art. 45, para. 7.

¹⁵ *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Preliminary Objections, 1992 ICJ REP. 240 (June 26) [hereinafter *Nauru*].

¹⁶ *LaGrand Case (Ger. v. U.S.)*, Merits (Int'l Ct. Justice June 27, 2001), 40 ILM 1069 (2001), available at <<http://www.icj-cij.org>>.

¹⁷ Commentaries, Art. 42, para. 2.

whether they may also create an indivisible whole so that the treaty obligations are to be performed in relation to every other state party to the agreement, or whether they may in some cases reflect obligations of a state toward the international community as a whole.¹⁸ If the first approach is accepted, then correlative rights and obligations exist between individual states, and the state holding the right can invoke state responsibility as against the holder of the obligation. This theory provides an orderly approach to international law, for it makes it relatively easy to identify who has the obligation and who the right of invocation. This bilateralist approach formed the basis of the traditional law of treaties and underlies the 1969 Vienna Convention on the Law of Treaties.¹⁹

The second approach is more complicated, because it posits that some agreements create rights and obligations that are indivisible for all states party to the treaty and that each state owes an obligation to every other state party to perform those treaty obligations. The 1963 Limited Test Ban Treaty²⁰ and the 1991 Protocol on Environmental Protection to the Antarctic Treaty²¹ exemplify this approach. The Vienna Convention on the Law of Treaties considers this problem in Article 60 by defining when a state party to a multilateral agreement may terminate or suspend its performance in response to a material breach by another contracting party. Article 60 provides that any state party may invoke a material breach to suspend the treaty in whole or in part if the "treaty is of such a character" that a material breach "radically changes the position of every party with respect to the further performance of its obligations under the treaty."²²

The third approach posits that multilateral agreements or customary international law may create obligations that run to the international community as a whole, as the International Court of Justice suggested in the *Barcelona Traction* case (referring to them as obligations *erga omnes*).²³ Determining which states have the right to invoke a breach of these obligations as grounds for taking remedial or counter-measures has proved controversial. In theory, states should be able to claim a breach of these obligations even if they have suffered no direct injury, but the Court did not go that far in *Barcelona Traction* and, indeed, in the earlier *South West Africa* cases ultimately declined to find that the applicant states had legal rights or interests sufficient for jurisdiction.²⁴

The International Law Commission, to its credit, considers all three categories of obligations and does so in an innovative, if perhaps controversial, way. The first two categories are addressed in Article 42(a) and (b), respectively. The last is handled through the mechanism of Article 48(1)(b), which provides that a state may invoke state responsibility if the obligation breached "is owed to the international community as a whole."²⁵ Article 48(1)(a) concerns

¹⁸ For excellent analysis of this issue, see, for example, Bruno Simma, *Bilateralism and Community Interest in the Law of State Responsibility*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY* 821 (Yoram Dinstein ed., 1989); Prosper Weil, *Towards Relative Normativity in International Law?* 77 *AJIL* 413 (1983) (arguing against moving away from traditional bilateralism).

¹⁹ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331 (entered into force Jan. 27, 1980).

²⁰ Treaty Banning Nuclear Testing in the Atmosphere, Oceans, and Outer Space, Aug. 5, 1963, TIAS No. 5433, 480 UNTS 43 (entered into force Oct. 10, 1963) [hereinafter *LTBT*].

²¹ Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 *ILM* 1455 (1991).

²² Vienna Convention on the Law of Treaties, *supra* note 19, Art. 60.

²³ *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Second Phase, 1970 *ICJ REP.* 3, 32, para. 33 (Feb. 5) [hereinafter *Barcelona Traction*].

²⁴ *South West Africa* cases (*Eth. v. S. Afr.*; *Liber. v. S. Afr.*), Second Phase, 1966 *ICJ REP.* 6 (July 18) [hereinafter *South West Africa*]. In the earlier Judgment on the Preliminary Objections, the Court found that it had jurisdiction because both Ethiopia and Liberia were former members of the League of Nations and thus could bring a claim against South Africa to enforce the obligations of the mandate. *South West Africa* cases (*Eth. v. S. Afr.*; *Liber. v. S. Afr.*), Preliminary Objections, 1962 *ICJ REP.* 319 (Dec. 21). But at the merits phase, the Court found an insufficient legal interest.

²⁵ Art. 48(1)(b).

the breach of those obligations owed to a group of states and established for the protection of the collective interest of the group. These obligations are distinct from those covered by Article 42(b) (in which the breach must specially affect one state or radically change the position of the other states to which the obligation is owed). Arguably, Article 48(1)(a) develops a different class of obligation, which derives from the traditional second category but contains elements of the third. It is linked to the important distinction that the ILC draws between the injured and the noninjured states, which is analyzed below. Notably, in this chapter the ILC does not address or even acknowledge the important role of nonstate entities and individuals in invoking state responsibility.

Article 42 and the Injured State

The articles distinguish between injured states (Art. 42) and states that have not been injured (Art. 48). The distinction replaces distinctions raised in previous Commission deliberations, such as between states with direct and indirect injuries. Article 42 entitles a state

as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) that State individually; or
 (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State; or
 (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.²⁶

The commentary makes clear that the definition of injury in Article 42 is “closely modelled on article 60 of the Vienna Convention on the Law of Treaties,”²⁷ which deals with material breaches of treaties. Under paragraph (a), a state is injured if the breached obligation was owed to it individually. This could occur under a bilateral agreement; a unilateral commitment (such as not to use a particular weapon or not to fish in a specific zone); a general rule of international law that gives rise to obligations between two states, such as those governing relations between riparian states on an international watercourse; or a multilateral agreement in which states have specific obligations toward each other, as in the Vienna Convention on Diplomatic Relations.²⁸ Under paragraph (b), a state qualifies as an injured state, according to the commentary, if it is “affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed”²⁹ or the breach affects “*per se* every other State to which the obligation is owed.”³⁰ A breach of the Limited Test Ban Treaty or the prohibition on sovereign territorial claims in the Treaty on Antarctica exemplifies the latter.³¹ The Commission chose in Article 42 to define the injured state narrowly, and has left the issues raised by the *Barcelona Traction* case and the *South West Africa* cases to Article 48.

The Commission’s distinction in Articles 42 and 48 between an injured and a noninjured state assumes that when a state violates obligations such as the prohibition on genocide or slavery and the right to self-determination, other states are not injured. But this assumption

²⁶ Art. 42.

²⁷ Commentaries, Art. 42, para. 4.

²⁸ Vienna Convention on Diplomatic Relations, *opened for signature* Apr. 18, 1961, TIAS No. 7502, 500 UNTS 95 (entered into force Apr. 24, 1964).

²⁹ Commentaries, Art. 42, para. 12.

³⁰ *Id.*, para. 13.

³¹ LTBT, *supra* note 20; Antarctic Treaty, Dec. 1, 1959, TIAS No. 4780, 402 UNTS 71 (entered into force June 23, 1961).

is questionable. While they may not be injured in the sense of Article 42, they nonetheless suffer injury from the fact that an obligation to which they subscribe has been breached and its status could therefore be threatened unless action is taken to enforce the obligation.³² States often put down “markers” in the form of statements when they observe other states breaching international obligations, such as by the use of chemical or biological agents, even though they are not directly injured by that use. They do so to secure the integrity of the rule and prevent its dissolution through unchallenged practice. In this sense, the development of a separate article to deal with a noninjured state is arguably misleading.

The old Article 40, the predecessor to Articles 42 and 48, did not distinguish between states on this point and treated all states as equally injured. This approach, too, had problems because not all states were equally injured. James Crawford, noting that this treatment was not conducive to developing public international law (rather than private international law), argued that it was important to distinguish between the primary beneficiaries (the right holders) and those states with a legal interest in compliance, “irrespective of how or whether the breach has affected [them].”³³

Article 48 and the Noninjured State

When the Commission thus decided to create a new article (Article 48) in which states could invoke responsibility for a breach of an obligation owed to the international community as a whole, even though the states had suffered no “injury” in the traditional use of that word, it made an important innovation. The distinction could provide a reasonable basis for later recognition of the rights of actors other than states to invoke state responsibility in these circumstances. If injury is not required, then nonstate actors (who similarly may find it difficult to show direct injury) should have an easier time in asserting competence to claim for breaches of obligations owed to the international community as a whole. As discussed later in this article, there is precedent at the national level for the right of groups and individuals to raise claims for breaches of environmental obligations even though the group or individual has not been directly injured. Article 48 reflects more recent developments in international law and represents its progressive development.

Under Article 48(1), states other than injured states can invoke the responsibility of another state in two contexts: if “(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.”³⁴ The commentary indicates that the former category, Article 48(1) (a), encompasses such agreements as regional security arrangements, regional systems for protecting human rights, and regional agreements for protecting the environment.³⁵ It reflects the *S.S. Wimbledon* case,³⁶ in which the Permanent Court of International Justice (PCIJ) granted standing to states party to a multilateral treaty even when some of them had suffered no direct injury.³⁷

³² See Brigitte Stern, *Et si l'on utilisait le concept de préjudice juridique? Retour sur une notion délaissée à l'occasion de la fin des travaux de la CDI sur la responsabilité des Etats*, 2001 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 3 (arguing against a distinction between injured and noninjured states on the grounds that all states are in some sense injured).

³³ James R. Crawford, *Responsibility to the International Community as a Whole*, 8 IND. J. GLOBAL LEGAL STUD. 303, 320 (2001).

³⁴ Art. 48(1).

³⁵ Commentaries, Art. 48, para. 7.

³⁶ *S.S. “Wimbledon”* (Ger. v. UK, Fr., Italy, Japan), 1923 PCIJ (ser. A) No. 1, at 15 (Aug. 17).

³⁷ When Germany refused to permit a British vessel under charter to a French company to navigate in the Kiel Canal, Great Britain, France, Italy, and Japan raised a claim against Germany for a violation of the Treaty of Versailles. The PCIJ recognized standing for all four states on the grounds that the states had a legal interest, since they were all states parties to the multilateral treaty and had vessels that used the Kiel Canal, even though Italy and Japan had no monetary interest in the outcome of this particular dispute. The commentary to Article 48, in paragraph 7, note 765, refers to this case in support of the text in Article 48.

The most interesting and presumably still controversial part of Article 48 is subparagraph (1)(b), which covers breaches of obligations “owed to the international community as a whole.” Here the Commission draws upon the International Court of Justice’s famous dictum in *Barcelona Traction* that there is a distinction between obligations owed to particular states and those owed to “the international community as a whole” and that as regards the latter, “all States can be held to have a legal interest in their protection.”³⁸ Although the Court referred to these as obligations *erga omnes*, the Commission eschews this term on the grounds that it has sometimes been confused with obligations owed to all parties to a treaty. Article 48 essentially reverses the Court’s position in the *South West Africa* cases, where the ICJ declined to recognize the standing of Ethiopia and Liberia to seek a declaration on the illegality of South Africa’s actions in South West Africa (now Namibia).³⁹ It permits states to raise claims regarding obligations owed to the community as a whole.⁴⁰ This category of obligations is likely to grow, especially in human rights and environmental protection. In the *Barcelona Traction* case, the Court enunciated a handful of such obligations: acts of aggression, genocide, slavery, and racial discrimination.⁴¹ As noted in the commentary,⁴² the Court in the *East Timor* case added the principle of “self-determination” as an *erga omnes* obligation.⁴³ Arguably, other obligations have also emerged, such as an obligation not to dispose of high- or medium-level nuclear wastes in the oceans.⁴⁴ Thus, the ILC not only reflects the Court’s assertion in the *Barcelona Traction* case, but sets the stage for states to invoke state responsibility for the breach of any obligation owed to the international community.

The text is significant for what it does not say. Article 48 refers to the “international community as a whole,” not to the international community of states as a whole, which is the phrase used in the Vienna Convention on the Law of Treaties.⁴⁵ The commentary to Article 25, where the phrase is first introduced, indicates that the Commission intentionally adopted the broader phrasing used in the *Barcelona Traction* case and subsequent international agreements, and rejected including the phrase “of States.”⁴⁶ This formulation conforms with the view that the international community now comprises important actors other than states.

Article 48(2) provides that any state that is entitled to invoke the responsibility of another state may ask not only for the cessation of the act and assurances that it will not recur, but also for reparation of the interest of the injured state or of the beneficiaries of the obligation that has been breached. It does not make clear whom the latter includes and the commentary

³⁸ *Barcelona Traction*, *supra* note 23, 1970 ICJ REP. at 32, para. 33.

³⁹ *South West Africa*, *supra* note 24.

⁴⁰ For analysis of compliance with and enforcement of these obligations, see Karl Zemanek, *New Trends in the Enforcement of Erga Omnes Obligations*, in 2000 MAX PLANCK Y.B. UN L. 1.

⁴¹ *Barcelona Traction*, *supra* note 23, 1970 ICJ REP. at 32, para. 34.

⁴² Commentaries, Art. 48, para. 9.

⁴³ *East Timor (Port. v. Austl.)*, 1995 ICJ REP. 90, 102, para. 29 (June 30).

⁴⁴ Under the London Convention of 1972, the dumping of high-level radioactive wastes into the oceans is prohibited and the dumping of any other radioactive wastes requires a special permit. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *opened for signature* Dec. 29, 1972, Art. IV & Annexes I, II, TIAS No. 8165, 1046 UNTS 120 [hereinafter 1972 London Convention]. Furthermore, Article XII calls for the parties to strive to protect the oceans from pollution from, inter alia, radioactive wastes. *Id.*, Art. XII(d). According to the International Maritime Organization (IMO), the parties to the 1972 London Convention placed a moratorium in 1983 on the dumping of low-level radioactive wastes and decided in 1993 to amend Annexes I and II to ban the dumping of all radioactive wastes. IMO, A Brief Description of the London Convention 1972 and the 1996 Protocol, at <http://www.londonconvention.org/London_Convention.htm> (last modified Mar. 25, 2001). This prohibition is embodied in the 1996 Protocol to the 1972 London Convention, which bans the dumping of any material that has a radioactive level above *de minimis* concentrations. London Protocol to the International Maritime Organization Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Nov. 7, 1996, Annex I, 36 ILM 1, 21 (1997). Further support for this obligation is found in the provision of the Antarctic Treaty that bans the disposal of all radioactive wastes in Antarctica, which encompasses portions of three oceans as defined by the Treaty. Antarctic Treaty, *supra* note 31, Art. 5.

⁴⁵ Vienna Convention on the Law of Treaties, *supra* note 22, Art. 53.

⁴⁶ Commentaries, Art. 25, para. 18.

does not elaborate on the point. The beneficiaries could extend, for example, to the individuals who benefit from human rights treaties. The provision expands the domain within which state responsibility operates and in this sense represents progressive international legal development.

The inclusion of the new Article 48(1) (b) was not accepted without controversy in the Commission. One member wanted to delete the article entirely because it was not a core issue of state responsibility. In finalizing the articles, the Commission agreed to delete any provision articulating the notion of international crimes, a controversial concept that had been included in earlier versions.⁴⁷

Article 48's extension to any state of the right to invoke state responsibility for breaches of obligations owed to the international community as a whole is a welcome development. If states were not allowed to do so, then many breaches could occur without the threat of a claim by any state against the wrongful act. This approach, however, poses potential dangers. Because no collective decision or third-party decision about a breach need be made, the provision leaves it to each state to determine whether a breach of an obligation owed to the international community as a whole has occurred and whether to make a claim. In writing about the potential inclusion of international crimes in the ILC articles, D. N. Hutchinson referred to this latitude as letting loose " 'a sort of international vigilantism', with States being wrongly accused of crimes and subjected to damaging measures without good cause."⁴⁸ The fear is that the rights conferred by Article 48(1) could be used to justify politically motivated acts or unilateral interventions by a state to enforce international law. To guard against the possibility that a state might be subjected to countermeasures based on a spurious legal claim that it has breached an obligation toward the international community as a whole,⁴⁹ the chapter on countermeasures, in Article 54, limits the right of any state entitled to invoke the responsibility of another state under Article 48(1) to "lawful measures."⁵⁰ The commentary indicates that the use of "lawful measures" rather than "countermeasures" in reference to Article 48(1) is deliberate; it permits practice to evolve in this area.⁵¹

While the argument that Article 48 could be used for spurious ends to justify unilateral interventions is a serious one, it should nonetheless be given limited weight today. The Commission's language anticipates that the obligations addressed in Article 48 will, at least for now, be relatively few and of a status comparable to those outlined by the Court in *Barcelona Traction* as obligations *erga omnes*. Moreover, the costs of a potentially frivolous or politically motivated claim, which can be disposed of as such, may be the price for a system in which states will now have the right to hold other states accountable for breaching obligations owed to the international community as a whole.

Standing Before International Tribunals

The principles underlying Articles 42 and 48 are in harmony with trends in international judicial bodies. Experience before the European Court of Human Rights suggests that states

⁴⁷ For a discussion of the comment and amendment process, see James Crawford, Fourth Report on State Responsibility, UN Doc. A/CN.4/517 & Add.1 (2001), available at <<http://www.un.org/law/ilc>>.

⁴⁸ D. N. Hutchinson, *Solidarity and Breaches of Multilateral Treaties*, 1988 BRIT. Y.B. INT'L L. 152, 202 (quoting Bruno Simma for the term "a sort of international vigilantism," Bruno Simma, *International Crimes: Inquiry and Countermeasures*, in INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 283, 299 (Joseph H. Weiler, Antonio Cassese, & Marina Spinedi eds., 1989)).

⁴⁹ *Id.*; see also Jonathan I. Charney, *Third State Remedies in International Law*, 10 MICH. J. INT'L L. 57, 101 (1989) (noting that "a substantial expansion of international law remedies to give third states a significant role. . . might erode, rather than enhance, obedience to the rule of law," and suggesting that third-state remedies under customary international law "may be appropriate in the case of a few subjects of international law under limited circumstances").

⁵⁰ Art. 54.

⁵¹ Commentaries, Art. 54, para. 7. See David J. Bederman's contribution to this symposium, *Counterintuiting Countermeasures*, 96 AJIL 817, 827-28 (2002).

do not necessarily need to be directly injured to have standing to raise claims. Under the European Convention on Human Rights, states have standing to make claims against other states for violations of the Convention, even though the invoking state, a party to the Convention, is not directly injured.⁵² The Court has issued judgments in at least three cases in which one state has complained of violations of the Convention by another state, and in other instances declared applications by states against other states admissible before the European Human Rights Commission.⁵³

Other international human rights agreements that similarly allow states to complain about another state's violation of the agreement include the American Convention on Human Rights (for states that declare the Commission competent to hear state-to-state claims),⁵⁴ the African Charter on Human and Peoples' Rights,⁵⁵ the International Convention on the Elimination of All Forms of Racial Discrimination,⁵⁶ the International Covenant on Civil and Political Rights (ICCPR) (an optional provision for states),⁵⁷ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (again, an optional provision).⁵⁸ In all of these examples, states can exercise their legal interest in ensuring compliance with the international agreement, although they have rarely done so.⁵⁹

Two areas of the International Court of Justice's jurisprudence are especially relevant to the issue of invocation: first, third-party requests to intervene in a dispute before the Court and, second, disputes brought to the Court in which a relevant third party was not included as a party to the proceedings. In both instances, while the Court has zealously guarded its jurisdiction, it has recently inched toward a more welcoming stance, which is consistent with the position taken by the ILC.

The ICJ has been very cautious in defining the legal interest required for interventions by third parties to disputes before it.⁶⁰ While its Statute allows third-party states to intervene, the Court has granted third-party intervention only twice. In the first case, the 1990 *Land, Island and Maritime Frontier Dispute*,⁶¹ the Court granted Nicaragua's right to intervene in a decision on the legal regime for the waters of the Gulf of Fonseca. In the second case, in 1999,

⁵² Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 33, 213 UNTS 221, *as amended by* Protocol No. 11, May 11, 1994, 33 ILM 960 (1994) (entered into force Nov. 1, 1998); *see also* Jochen A. Frowein, *The Contribution of the European Union to Public International Law*, in *THE EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION, STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUS-DIETER EHLERMANN* 171, 175–77 (Armin von Bogdandy, Petros C. Mavroidis, & Yves Meny eds., 2002) (discussing measures taken by the European Community in response to the Iran hostage crisis and to the human rights violations in Kosovo and noting at 176 that public international law permits actions by “not directly affected states to grave breaches of public international law”).

⁵³ The Court has issued final decisions in the cases of *Cyprus v. Turkey*, App. No. 25781/94 (May 10, 2001); *Denmark v. Turkey*, App. No. 34382/97 (Apr. 5, 2000); and *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978), *all available at* <<http://www.echr.coe.int/Hudoc.htm>>. The Court also declared admissible four applications against Greece in 1968; however, no further action was taken with respect to these applications. *Denmark v. Greece*; *Norway v. Greece*; *Sweden v. Greece*; *Netherlands v. Greece*, Hudoc Reference No. REF00002880 (1968), *available at* <<http://www.echr.coe.int/Hudoc.htm>>.

⁵⁴ American Convention on Human Rights, Nov. 22, 1969, Art. 45, 1144 UNTS 123 (entered into force July 18, 1978).

⁵⁵ African Charter on Human and Peoples' Rights, June 27, 1981, Art. 47, 21 ILM 58 (1982) (entered into force Oct. 21, 1986).

⁵⁶ International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, Art. 11, 660 UNTS 195 (entered into force Jan. 4, 1969).

⁵⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 41, 999 UNTS 171 (entered into force Mar. 23, 1976).

⁵⁸ Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, Art. 21, 1465 UNTS 85 (entered into force June 26, 1987).

⁵⁹ Most complaints have been brought by individuals, *see infra* notes 79–90 and corresponding text.

⁶⁰ For an excellent analysis of third-state remedies, *see Charney, supra* note 49.

⁶¹ *Land, Island and Maritime Frontier Dispute* (El Sal./Hond.), Application to Intervene, 1990 ICJ REP. 92 (Sept. 13) [hereinafter *Nicaragua Intervention*].

the Court permitted Equatorial Guinea to intervene in the boundary dispute between Cameroon and Nigeria to protect its legal interest in the maritime boundary between the two.⁶² In the most recent case, however, involving a dispute between Indonesia and Malaysia over Pulau Ligitan and Pulau Sipadan, the Court declined to accept the Philippines' application to intervene. While the Philippines argued that an ICJ decision could affect the status and interpretation of various agreements regarding its sovereign rights in North Borneo, the Court was not convinced,⁶³ finding that its judgment would not actually influence the Philippines' claim to North Borneo.⁶⁴ In dissent, Judge Oda questioned how the Court could know whether its decision in the case would affect the Philippines' rights unless that state were allowed to intervene and present its arguments.

The International Court of Justice has addressed its jurisdiction in at least three disputes involving third countries that were not parties before it; the Permanent Court of International Justice addressed it once, when the League of Nations requested an advisory opinion. Jurisdiction was sustained in only one of the cases.

In the *Eastern Carelia* case, the PCIJ declined to issue an advisory opinion on the interpretation of a bilateral treaty in a dispute between Finland and Russia over the status of East Karelia, because Russia had refused to participate in the proceedings and did not recognize the jurisdiction of the League or the Court.⁶⁵ Later, in the classic case of *Monetary Gold*,⁶⁶ the International Court of Justice declined to accept jurisdiction in a claim brought by Italy because, if it had accepted the case, the Court would have been required to decide whether Albania had wronged Italy, and Albania was not before the Court. In the *Nauru* case almost forty years later,⁶⁷ the Court accepted jurisdiction even though Australia argued that any decision would involve the rights and obligations of the other two states that had been jointly designated by the United Nations in 1947 as the administering authority over the territory of Nauru. The ILC's Article 47 reflects this holding in providing that if "several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked."⁶⁸ In the most recent case, *East Timor*,⁶⁹ the Court again declined jurisdiction on the grounds that it would have to rule on the lawfulness of the conduct of Indonesia, which was not a party to the proceedings. It reached this decision even though Portugal maintained

⁶² Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.), Application to Intervene, 1999 ICJ REP. 1029 (Oct. 21). In doing so, the Court quoted its opinion in *Nicaragua Intervention*: "So far as the object of [a state's] intervention is 'to inform the Court of the nature of the legal rights of [that state] which are in issue in the dispute', it cannot be said that this object is not a proper one: it seems indeed to accord with the function of intervention." Land and Maritime Boundary Between Cameroon and Nigeria, *supra*, para. 14 (quoting *Nicaragua Intervention*, *supra* note 61, at 130, para. 90).

⁶³ Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Application to Intervene (Int'l Ct. Justice Oct. 23, 2001), available at <<http://www.icj-cij.org>>. North Borneo is the area formerly known as the British North Borneo Co. and is now generally acknowledged as Sabah, an independent state of Malaysia. The Philippines uses the term North Borneo (rather than Sabah) because its claim of sovereignty conflicts with that of Malaysia.

⁶⁴ *Id.*, para. 82. Before making this finding, the Court articulated several principles regarding intervention under Article 62 of the ICJ Statute. Specifically, the Court reiterated that claims for intervention do not require a jurisdictional link to the parties, *id.*, para. 35, and furthermore, that the claim need not even concern the same subject matter as the principal case before the Court, *id.*, paras. 48–55. All that is required for intervention is that a legal interest could be affected by the decision in the case, *id.*, para. 56, and the Court broadened this category by allowing interests to relate not only to the *dispositif* of the case, but also to the reasons necessary to constitute the *dispositif*, *id.*, para. 47. Judge Franck wrote separately to emphasize that had the Philippines met its burden in pleading the effect on its interest, he would still deny intervention, finding that its interest in sovereignty over North Borneo is contrary to the right of self-determination held and exercised by the people of that territory and is therefore barred by international law. *Id.*, Separate Opinion of Judge *ad hoc* Franck, para. 15.

⁶⁵ Status of Eastern Carelia, Advisory Opinion, 1923 PCIJ (ser. B) No. 5, at 6 (July 23). The contemporary spelling of the name of the territory is Karelia.

⁶⁶ Monetary Gold Removed from Rome in 1943 (Italy v. Fr., UK, U.S.), 1954 ICJ REP. 19 (June 15).

⁶⁷ Nauru, *supra* note 15.

⁶⁸ Art. 47(1).

⁶⁹ East Timor, *supra* note 43.

that the right that Australia had breached (the right of self-determination) was a right *erga omnes*. Thus, the Court has been quite scrupulous in insisting that it not take jurisdiction over disputes in which the legal interests of a state not a party to the proceeding would be adjudicated, but it has also been sensitive to the need that states not escape accountability because several are responsible, as in the *Nauru* case.

In light of the cautious jurisprudence of the International Court of Justice in delineating the "legal interest" required for third parties to intervene and in determining whether the "legal interest" of a state not a party to the proceeding would be adjudicated, the International Law Commission deserves commendation for broadening a state's right to invoke the responsibility of other states for breaches of obligations to the international community as a whole, even when the invoking state was not "injured" (as defined by the Commission).

Standing in National Courts

The ILC's approach to the nature of the right required to invoke responsibility is also in keeping with practice in some national systems. Standing requirements in domestic courts for persons and groups wishing to enforce national legislation vary widely among countries. In the United States, for example, the Constitution permits actions on behalf of a group of individuals so long as individuals in the group or the group itself suffers injury that is traceable to a specific act and can be redressed by judicial action.⁷⁰ Although not constitutionally required, the interest injured must also fall within the zone of interests protected by the statute. In practice, the definition of injury to the group has varied over the years and with different court jurisdictions; it generally extends, however, to use by the group of an environmental amenity.⁷¹ This interpretation is analogous perhaps to Article 48(1)(a), concerning the breach of an obligation owed to a group of states established for the collective interest of those states, although the requirement of an injury, if only to the use of an amenity shared with others, arguably brings it closer to Article 42 on the injured state.

Among the most on-point precedents supporting the text of the ILC's Article 48(1) are those of the Environment Court in New Zealand and the Land and Environment Court in New South Wales, Australia. In New Zealand, legislation authorizes individuals to bring claims before the New Zealand Environment Court without a requirement of personal injury.⁷² Rather, individuals represent the public interest in compliance with the law.⁷³ Individuals may request declarations for the interpretation of rights and duties under the Resource Management Act, seek civil enforcement orders, or even in some circumstances pursue criminal enforcement. Local and state authorities, in addition to seeking any of the aforementioned judicial remedies, can issue orders to abate the offending actions.⁷⁴ The court has become increasingly active. While 1224 claims were filed and 349 formal decisions issued for the year ending in June 1997, 1395 claims were filed and 833 decisions rendered for the year ending in June 2001.⁷⁵ Thus, the decisions issued over a four-year period more than doubled.

⁷⁰ See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972) (dismissing an action due to lack of a recognized interest).

⁷¹ Compare *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (finding that indefinite plans to visit other countries cannot lay the basis for injury), with *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000) (finding that avoidance by local residents of a river that they would use but for fear of contamination is sufficient to establish an injury).

⁷² Resource Management Act, 1991, §§311(1), 316(1), 338(4) (NZ). Each section provides for a different form of citizen enforcement, and all sections state that any person at any time may initiate these proceedings.

⁷³ *Id.* §274(1) (as amended in 1996, allowing "any person representing some relevant aspect of the public interest" to appear and call evidence before the court).

⁷⁴ *Id.* §322.

⁷⁵ Report of the Registrar of the Environment Court for the 12 Months Ended 30 June 2001, sec. 2.1 (June 22, 2002), available at <<http://www.courts.govt.nz/environment/news.html>>.

Similarly, under the Environmental Planning and Assessment Act and the Heritage Act of New South Wales, Australia, any person may bring proceedings before the Land and Environment Court seeking "an order to remedy or restrain a breach of this Act, *whether or not any right of that person has been or may be infringed by or as a consequence of that breach.*"⁷⁶ In the category of cases involving environmental planning and protection, the court reported a 15 percent increase in the number of cases submitted in 2001 over the year 2000, which means that about 230 submissions were received.⁷⁷ Again, this provincial experience provides precedent for permitting actors to make formal claims in the absence of injury in order to protect community interests in the environment.⁷⁸

III. NONSTATE ACTORS AS INVOKING STATE RESPONSIBILITY

As the foregoing discussion of Article 48 suggests, the articles contain useful progressive elements regarding the nature of the interest required to invoke state responsibility. However, they should have done more to recognize the expanded universe of participants in the international system entitled to invoke state responsibility.

As indicated at the outset, the ILC articles focus on the rules by which states can invoke the responsibility of another state for breaching its international obligation. But the world has evolved considerably over the last four decades since the Commission began its deliberations. Three areas illustrate the significant role of individuals and nonstate entities in invoking state responsibility before international dispute settlement bodies: human rights, environmental protection, and foreign investor protection. In many instances, international agreements provide for individual complaint procedures. The widespread existence of *lex specialis* contributes to the development of international law regarding the invocation of state responsibility.

Human Rights

Various international and regional fora recognize that individuals have standing to make claims against states for violations of human rights. Within the United Nations system, four international agreements give individuals or groups of individuals the right to complain about violations of the protected rights: the First Optional Protocol to the International Covenant on Civil and Political Rights,⁷⁹ the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women,⁸⁰ the Convention Against Torture and Other Forms of Cruel and Inhuman Punishment,⁸¹ and the International Convention on the Elimination of All Forms of Racial Discrimination.⁸²

The First Optional Protocol to the ICCPR gives individuals the right to make written representations to the UN Human Rights Committee for violations of the Covenant by those states that have accepted the Protocol. If the Committee finds the petition admissible, it receives submissions from both the individual and the targeted state and determines whether a violation has occurred. From its beginning in 1977 through August 27, 2002, the Committee

⁷⁶ This language appears in both the Environmental Planning and Assessment Act, 1979, §123 (N.S.W.), and (in slightly abbreviated form) the Heritage Act, 1977, §153 (N.S.W.) (emphasis added).

⁷⁷ LAND AND ENVIRONMENT COURT OF N.S.W., ANNUAL REVIEW 2001, at 17, available at <<http://www.lawlink.nsw.gov.au/lec/lec.nsf/pages/courtperformance>> (visited Aug. 12, 2002).

⁷⁸ The suits that citizens can bring for breaches of the act lead to court orders, which are comparable to injunctions and restitution.

⁷⁹ International Covenant on Civil and Political Rights, *supra* note 57, First Optional Protocol, Art. 1, 999 UNTS at 302.

⁸⁰ Convention on the Elimination of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 UNTS 13, Optional Protocol, GA Res. 54/4, annex (Oct. 6, 1999) (entered into force Dec. 22, 2000) [hereinafter *Optional Protocol to Discrimination Against Women Convention*].

⁸¹ Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 58, Art. 22.

⁸² International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 56, Art. 14.

registered 1100 communications concerning seventy states.⁸³ As of August 27, 2002, the Committee had expressed its views on the merits in 403 cases, and 242 cases were "living" or pending.⁸⁴ The numbers of submissions are increasing annually, and the Committee is functioning increasingly as a forum for adjudicating human rights disputes.

In 1999 parties to the Convention on the Elimination of Discrimination Against Women adopted an Optional Protocol (based on the ICCPR model) that gives individuals or groups of individuals the right to submit written communications "claiming to be victims" of violations of any of the rights in the Convention by states that have accepted the Protocol.⁸⁵ The UN Committee on Economic, Social and Cultural Rights has considered developing an optional protocol to the International Covenant on Economic, Social and Cultural Rights, which would similarly give individuals the right to complain of a breach of the Covenant by a state party to such a protocol.

The Convention Against Torture and the International Convention on the Elimination of All Forms of Racial Discrimination both create an individual complaint procedure, which states can opt into. As of May 30, 2002, the Committee Against Torture had registered 200 communications against twenty-one countries, with 46 cases pending.⁸⁶ The Committee on the Elimination of Racial Discrimination considers complaints filed by individuals or groups of persons claiming to be victims of racial discrimination by a state that is a party to the Convention and has declared that it recognizes the committee's competence to receive individual complaints. Between 1982, when the procedure went into effect, and June 25, 2002, the committee concluded 21 cases against seven countries, with one case pending.⁸⁷ The committee expressed its views on the merits in 13 of the cases.⁸⁸

At the regional level, the evidence is even more persuasive that individuals have become important actors in invoking state responsibility. The European Court of Human Rights in the year 2001 received 31,393 individual communications complaining of violations of the European Convention on Human Rights. Of these, the Court registered 13,858 applications, took decisions in 9728, and rendered judgments in 888 cases. The numbers have been growing each year. In 1999 the Court registered 8400 applications and in 2000, 10,482, while it rendered 177 and 695 judgments in these years, respectively.⁸⁹ These numbers far exceed the number of state-to-state complaints.

In the inter-American system, individuals can also bring claims for human rights violations, although not directly to the Inter-American Court of Human Rights. Under the American Convention on Human Rights, individuals must initially file a complaint with the Inter-American Commission on Human Rights, which can forward it to the Court.⁹⁰ Again, individuals have used this procedure frequently. One might also analogize to the inter-American system and argue that the prosecutors at the Tribunals for the Former Yugoslavia and for

⁸³ Statistical Survey of Individual Complaints Dealt with by the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights (Aug. 27, 2002), at <<http://www.unhchr.ch/html/menu2/8/stat2.htm>>.

⁸⁴ *Id.*

⁸⁵ Optional Protocol to Discrimination Against Women Convention, *supra* note 80, Art. 2.

⁸⁶ Statistical Survey of Individual Complaints Dealt with by the Committee Against Torture Under the Procedure Governed by Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (May 30, 2002), at <<http://www.unhchr.ch/html/menu2/8/stat3.htm>>.

⁸⁷ Statistical Survey of Individual Complaints Considered Under the Procedure Governed by Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (June 25, 2002), at <<http://www.unhchr.ch/html/menu2/8/stat4.htm>>.

⁸⁸ *Id.*

⁸⁹ EUROPEAN COURT OF HUMAN RIGHTS, APERÇU 2001, at 29, available at <<http://www.echr.coe.int/Fr/InfoNotesAndSurveys.htm>>.

⁹⁰ American Convention on Human Rights, *supra* note 54, Art. 44.

Rwanda are similarly bringing claims on behalf of individuals against states, albeit against individuals acting for the state or under color of state authority.⁹¹

At the national level, courts in the United States have recognized the right of individuals to bring claims for actions other individuals allegedly took as officials in violation of the "law of nations." In *Kadic v. Karadzic*, one of the most publicized cases, the U.S. Court of Appeals for the Second Circuit recognized the right of victims of certain atrocities allegedly committed by Radovan Karadžić to bring international legal claims before U.S. courts.⁹² In 2002 a federal district court declined to recognize jurisdiction over Robert Mugabe, the president of Zimbabwe, and several senior government officials, for alleged acts of torture and terrorism, but did find that they could be served in their capacity as leaders of their political party, the African National Union–Patriotic Front.⁹³ By doing so, the court indicated that it construed "immunity" narrowly, even in the face of contrary interpretations of treaty obligations by the U.S. executive branch.⁹⁴ While on the one hand, these cases relate to the extension of state responsibility to individuals acting for the state or under color of state authority, on the other hand, they reveal the growing trend to open courts to individuals claiming breaches of international obligations.

Environmental Protection

Developments in international environmental law have begun to mirror those in human rights, albeit in an as yet modest way. The North American Agreement on Environmental Cooperation, negotiated as a parallel agreement to the North American Free Trade Agreement (NAFTA), gives nongovernmental organizations and individuals the right to complain that one of the three states party to the agreement "is failing to effectively enforce its environmental

⁹¹ Both Tribunals were established by the Security Council under Chapter VII of the Charter of the United Nations. SC Res. 827, UN SCOR, 48th Sess., Res. & Dec., at 29, UN Doc. S/INF/49 (1993) (establishing the Tribunal for the Former Yugoslavia); SC Res. 955, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994) (establishing the Tribunal for Rwanda). The Statutes of the two Tribunals allow the prosecutor to initiate an indictment on his own, or on the basis of information received from any source (although the Statutes set a preference for information from states or formal organizations, individuals are not precluded from providing information in order to initiate an indictment). Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Art. 18, 32 ILM 1192 (1993); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, Art. 17, annex to SC Res. 955, *supra*, reprinted in 33 ILM 1602 (1994). For an overview of the Tribunal for the Former Yugoslavia, see Michael P. Scharf, *A Critique of the Yugoslavia War Crimes Tribunal*, 25 DENV. J. INT'L L. & POL'Y 305 (1997) (indicating that the Tribunal is an improvement over the Nuremberg Tribunal, but that it is far from a perfect system).

⁹² *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (the court found subject matter jurisdiction under the Alien Tort Claims Act, 28 U.S.C. §1350 (1988)). The Alien Tort Claims Act gives U.S. federal courts original jurisdiction over tort claims made by aliens for torts committed in violation of the law of nations (or a treaty of the United States). The trial court had dismissed for lack of subject matter jurisdiction because it held that only state actions, and not individual actions, could violate the law of nations. The appellate court reversed, finding instead that certain individual actions, genocide, war crimes, and some crimes against humanity are violations of the law of nations. The court also suggested that Karadžić could be liable for other crimes as the president of the Republika Srpska because, although Srpska was never formally recognized as a state, it appeared to satisfy the criteria for being a state, including having sovereignty over land and people. *Karadzic*, 70 F.3d at 245; see also *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987) (concluding in suit brought by Argentine citizens in the United States against former Argentine general that claims of official torture, prolonged arbitrary detention, and summary execution all constituted "international tort" claims that could be adjudicated under the Alien Tort Statute).

⁹³ *Tachiona v. Mugabe*, 169 F.Supp. 2d 259 (S.D.N.Y. 2001). The U.S. District Court for the Southern District of New York denied the U.S. government's motion to reconsider the decision, 186 F.Supp. 2d 383 (S.D.N.Y. 2002).

⁹⁴ The case addresses the issue of who can be sued, but it also demonstrates the court's receptivity to letting individuals try to hold officials responsible for violations of international law, even if only in their simultaneous role as leaders of a nongovernmental organization.

law.⁹⁵ This provision has also been interpreted to give individual corporations the right to lodge a complaint.⁹⁶ In response to a qualifying submission, the secretariat of the commission requests a response from the state, and after considering both, may recommend the preparation of a factual record to the council. The council, by a two-thirds vote, can then order this record prepared and has the option, again by a two-thirds vote, to make it publicly available.⁹⁷ As of October 8, 2002, the Commission on Environmental Cooperation had received thirty-five submissions on enforcement matters since its inception in 1995, with a sharp increase in their number in the last few years.⁹⁸ It had prepared and released factual records in three cases and was in the process of preparing seven other factual records.⁹⁹ Most of the submissions were presented by several organizations, and often by individuals.

Individuals or nonstate entities concerned about breaches of environmental or natural resources law can now file complaints against a state and seek arbitration at the Permanent Court of Arbitration (PCA). The PCA's new Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment were unanimously adopted on June 19, 2001.¹⁰⁰ They are modeled after the UNCITRAL Arbitration Rules.

Investor Claims

When the International Law Commission began its work, state responsibility generally meant the substantive rules for protecting aliens, particularly in the area of foreign investment.¹⁰¹ At the time, foreign investor claims were viewed largely in terms of diplomatic protection, as claims brought by a state for injury to its nationals. Within the last decade or two, however, investors have increasingly resorted directly to international dispute settlement procedures for breaches. The International Centre for Settlement of Investment Disputes (ICSID) provides a mechanism for states and foreign investors to resolve their disputes voluntarily. More than fifty contracting parties to the ICSID Convention have introduced legislation that

⁹⁵ North American Agreement on Environmental Cooperation, Sept. 8–14, 1993, U.S.-Can.-Mex., Art. 14, 32 ILM 1480 (1993) [hereinafter NAAEC]. Article 14 provides, in pertinent part:

1. The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.

Notice that nowhere in Article 14 is the person or organization making the submission required to demonstrate injury.

⁹⁶ Methanex Submission, SEM-99-001 (Oct. 18, 1999), available at <<http://www.cec.org/citizen/index.cfm?varlan=english>>, in which Methanex Corp., incorporated under the laws of Alberta, Canada, alleged that California and/or the United States had failed to enforce environmental regulations. As of June 30, 2000, the secretariat determined it would not proceed with this submission because the dispute was also the subject of a NAFTA Chapter 11 claim. Under Article 14.3(a) of the NAAEC, the secretariat is not allowed to proceed with a submission if the party's response indicates that the matter is the subject of a pending judicial or administrative proceeding.

⁹⁷ NAAEC, *supra* note 95, Art. 15.

⁹⁸ Citizen Submissions on Enforcement Matters, at <<http://www.cec.org/citizen/index.cfm?varlan=english>> (visited Oct. 8, 2002). For an informative analysis of the commission's work on these submissions, see David L. Markell, *The Commission for Environmental Cooperation's Citizen Submission Process*, 12 GEO. INT'L ENVTL. L. REV. 545 (2000).

⁹⁹ Citizen Submissions on Enforcement Matters, *supra* note 98.

¹⁰⁰ Permanent Court of Arbitration, *Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment* (June 29, 2001), available at <<http://www.pca-cpa.org/BD/>>.

¹⁰¹ Daniel Bodansky & John R. Crook, *Introduction and Overview*, 96 AJIL 773 (2002) (introducing this symposium and providing details of historical development of the ILC's work).

permits ICSID arbitration or conciliation.¹⁰² More than fifteen hundred bilateral investment treaties and four multilateral treaties, including the NAFTA, designate ICSID as a forum for resolving disputes.¹⁰³ Since its beginning, ICSID has received ninety-three requests for arbitration and three requests for conciliation.¹⁰⁴ Eight cases have been brought pursuant to the NAFTA's provisions on dispute settlement.

Investors have also been able to file complaints in national courts or administrative tribunals pursuant to bilateral investment agreements. As of December 2000, the United States had signed forty-five bilateral investment treaties,¹⁰⁵ thirty-seven of which were in force.¹⁰⁶ The standard provision in these treaties allows an individual investor to use the courts or administrative tribunals of the party involved in the dispute, to resort to ICSID or other agreed-upon international arbitration procedures, and to obtain domestic interim injunctive relief during the arbitration process.

European Community Courts

For over a decade, the European Court of Justice has acknowledged the right of individuals to seek reparations from states for breaches of the Treaty Establishing the European Economic Community. In the landmark 1990 *Francovich* judgment, the Court permitted Italian citizens to seek reparations for lost wages caused by the alleged breach of Italy's obligation under the Treaty to implement a European Community directive providing for minimum protection for workers in case of employer insolvency.¹⁰⁷ The Court set forth three conditions permitting individual recovery: the directive was intended to convey individual rights; the content of the rights could be determined solely from the directive's provisions; and a causal link existed between the state's failure to implement the directive and the damage suffered.¹⁰⁸ Subsequent cases have expanded the scope of this decision. In 1996 in *Brasserie du Pêcheur*, the Court announced that individuals could seek reparations for any serious breach of international law that infringed their rights.¹⁰⁹ In *Dillenkofer*, the Court ruled that a country's failure to implement a Council directive in a timely manner was per se a serious breach of international law, which thus expanded the range of acts for which individuals could seek reparations under *Brasserie du Pêcheur*.¹¹⁰

More recently, in May 2002, a decision in the Court of First Instance of the European Communities significantly expanded the possibilities for individuals to challenge the Community's

¹⁰² Andres Rigo, *ICSID: An Overview*, in INT'LARB. REP., Winter 2002 (Fulbright & Jaworski) (also available in mimeo from author). For the ICSID Convention, see Convention for the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, TIAS No. 6090, 575 UNTS 159.

¹⁰³ Rigo, *supra* note 102. The four are the North American Free Trade Agreement, Dec. 8–17, 1992, Art. 1120, 32 ILM 289 (1993); Energy Charter Treaty, *opened for signature* Dec. 17, 1994, Art. 26(4), 34 ILM 381 (1995); Protocolo de Colonia para la Promoción y Protección Recíproca de Inversiones en el MERCOSUR, Jan. 17, 1994, Art. 9.4(a) (adopted by Mercosur\CMC\Dec No 11/93), available at <<http://www.sagpya.mecon.gov.ar/0-7/Mercosur/decisiones/1993/d9311.htm>>; Treaty on Free Trade, June 13, 1994, Colom.-Venez.-Mex., Arts. 17–18, available at <http://www.sice.org/Trade/63_E/63E_TOC.asp>.

¹⁰⁴ Rigo, *supra* note 102. The rate of submissions for arbitration has increased from an average of one per year to one per month.

¹⁰⁵ U.S. Dep't of State, List of U.S. Bilateral Investment Treaties Through December 2000 (Jan. 22, 2001), available at <<http://www.state.gov/e/eb/ris/fs/1139.htm>> (visited Sept. 27, 2002).

¹⁰⁶ U.S. Dep't of Commerce, Trade Compliance Center, at <<http://www.export.gov/tcc>> (visited Aug. 12, 2002).

¹⁰⁷ Joined Cases C–6/90 & C–9/90, *Francovich v. Italy*, 1991 ECR I–5357.

¹⁰⁸ *Id.*, para. 40.

¹⁰⁹ Joined Cases C–46/93 & C–48/93, *Brasserie du Pêcheur SA v. Germany*, & *The Queen v. Secretary of State for Transport ex parte Factortame Ltd.*, 1996 ECR I–1029, [1996] 1 C.M.L.R. 889 (1996) (both Germany and Britain had failed to repeal economic regulations that conflicted with certain aspects of Community law).

¹¹⁰ Joined Cases C–178/94, C–179/94, C–188/94, C–189/94, & C–190/94, *Dillenkofer v. Germany*, 1996 ECR I–4845, [1996] 3 C.M.L.R. 469 (1996).

measures of general application.¹¹¹ Until now, the European Community courts have required that individuals show unique injury specific to themselves to challenge measures of general application. The *Jégo-Quéré* decision gives standing to any individual who is immediately and directly affected, whether or not other persons are also so affected. The decision, if it stands, could open European Community courts to many more individual claims, and reflects the broader international trend to expand the definition of those who have a legal interest in the performance of international obligations.

The International Court of Justice

Only states can bring claims against other states in the International Court of Justice for the breach of international obligations. Nonetheless, the Court came close to giving effect to individual rights in the *LaGrand* case and in earlier advisory opinions on matters regarding UN staff members.

In *LaGrand*, the ICJ found that the Vienna Convention on Consular Relations,¹¹² in Article 36, created individual rights, which Germany as the national state of the detained person could raise as a diplomatic protection claim before the Court.¹¹³ Germany further claimed that the right of individuals to be informed of their rights without delay was an individual human right, but the Court noted that since it had found that the United States had violated the rights of the *LaGrand* brothers under Article 36, paragraph 1 of the Convention, it did not need to consider the additional argument.¹¹⁴ The Court's recognition that the Vienna Convention created individual rights could, nonetheless, affect domestic court practice in the United States.¹¹⁵ In response to the *LaGrand* case, the Oklahoma Court of Criminal Appeals stayed the execution of a Mexican national in September 2001. However, the court's decision on May 1, 2002, indicated that whether or not the Vienna Convention created individual rights, it could not provide a judicial remedy where the petitioner had initially failed to raise the issue.¹¹⁶

In the advisory opinions regarding UN staff members, the Court in effect, though not as a matter of formal law, heard the claims of individuals. In 1955 the United Nations General Assembly, on the advice of the International Court of Justice, created a Committee on Applications for Review of Administrative Tribunal Judgements to receive requests from staff members (or the UN Secretary-General or a member state) for the International Court of Justice to review a judgment of the Administrative Tribunal and issue an advisory opinion on it.¹¹⁷ In the 1970s and 1980s, the ICJ reviewed three such cases. While the requests formally came from the committee of the General Assembly, the procedure followed was for the applicant to address them to the United Nations Secretary-General, who then forwarded them unchanged to the Court. While individuals, of course, do not have standing before the ICJ, this procedure, through a thin veil, effectively gave them standing to have the Court review their case. The committee and the review procedure were abolished in 1995.¹¹⁸

¹¹¹ Case T-177/01, *Jégo-Quéré & Cie SA v. Commission* (May 3, 2002), available at <<http://curia.eu.int/common/reccdoc/indexaz/en/t2.htm>> (French fishing company challenge to European Community regulation prohibiting use of certain type of fishing net, when regulation did not apply solely to that company and caused no unique damage).

¹¹² Vienna Convention on Consular Relations, Apr. 24, 1963, TIAS No. 6820, 596 UNTS 261 (entered into force Mar. 19, 1967).

¹¹³ *LaGrand*, *supra* note 16, para. 77.

¹¹⁴ *Id.*, para. 78.

¹¹⁵ See William J. Aceves, Case Report: *LaGrand* (Germany v. United States), 96 AJIL 210 (2002).

¹¹⁶ *Valdez v. Oklahoma*, 46 P.3d 703 (Okla. Crim. App. 2002). The court relied on *Breard v. Greene*, 523 U.S. 371 (1998), to conclude that the procedural requirements of the state statute barred the petitioner's claim, and it rejected petitioner's argument that relief was unavailable at the first application because the *LaGrand* case had not yet been decided.

¹¹⁷ GA Res. 957, UN GAOR, 10th Sess., Supp. No. 19, at 30, UN Doc. A/3116 (1955).

¹¹⁸ See Edith Brown Weiss, *Introduction to Part III*, in PAUL C. SZASZ, SELECTED ESSAYS ON UNDERSTANDING INTERNATIONAL INSTITUTIONS AND THE LEGISLATIVE PROCESS 239 (Edith Brown Weiss ed., 2001). Since the procedure was abolished, individual UN staff members no longer have this "indirect" access to the Court.

The data from the quite different fields of human rights, environmental protection, and foreign investor protection and the experience in the European Community point in the same direction. Individuals, nongovernmental organizations, and corporations can turn to a growing number of fora in which to lodge formal complaints invoking state responsibility for the breach of international obligations. Their use of these fora is accelerating, sometimes rapidly. One can envisage that procedures giving nonstate actors rights to lodge complaints against states may expand to other areas of international law and to other fora.¹¹⁹

IV. THE ILC AND NONSTATE ACTORS

The ILC's deliberations reveal that members were well aware of the possibility that entities other than states might invoke state responsibility. Some wanted to address the issue, while others did not. In the end, the ILC referred to the issue in part 2 (which addresses the content of the international responsibility of states), but not in the articles of part 3 on invoking state responsibility. The Commission's overall approach to individuals and nonstate entities was to leave this matter to *lex specialis* rather than to enunciate a general rule. As a result, whether and to what extent entities other than states may invoke responsibility varies depending on the primary rule involved.

In keeping with this approach, little wording in the articles directly bears on the topic. The only explicit reference to individuals and nonstate entities occurs in Article 33(2), which provides that part 2 "is without prejudice to any right, arising from the international responsibility of a State, which *may* accrue directly to any person or entity other than a State."¹²⁰ Thus, the article recognizes that the primary rule may provide rights for nonstate entities. Further, the articles in part 2 do not refer to the actor to whom the obligation is due, and in this sense are drafted consistently with obligations running to nonstate actors. The commentary to Article 33(2) adds that in such cases, "it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State,"¹²¹ and refers to human rights treaties and bilateral or regional investment protection agreements. Lest there be any doubt, the commentary also notes that "[t]he articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear."¹²²

The blanket Article 55, "*Lex specialis*" in part 4 (general provisions), adds more generally that the articles do not apply "where and to the extent that . . . implementation of the international

¹¹⁹ In a related development, nongovernmental organizations and individuals have the right to complain to the World Bank Inspection Panel that the World Bank, an intergovernmental organization, has failed to follow its procedures in its project financing and that this failure has directly harmed them or their interests. See 2 WORLD BANK, OPERATION MANUAL, OP 17.55, Annexes A, B, C, available at <<http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf>> (visited Aug. 12, 2002). As of June 2002, the panel had received twenty-six requests, twelve of which led to panel investigations. See World Bank, Summary of Requests for Inspection, available at <<http://wbln0018.worldbank.org/ipn/ipnweb.nsf/Wrequest>> (visited Aug. 12, 2002). The Office of the Compliance Advisor/Ombudsman (CAO) for the International Finance Corporation (IFC) and Mutual Investment Guarantee Agency (MIGA), created in 1998, receives complaints from individuals and communities adversely affected by IFC- and MIGA-supported projects. See Compliance Advisor Ombudsman, Introduction, at <<http://www.cao-ombudsman.org>> (visited Aug. 22, 2002); Center for International Environmental Law, The Compliance Advisor/Ombudsman (CAO), available at <<http://www.ciel.org/Ifi/ifcdes.html>> (visited Sept. 27, 2002). Other multilateral development banks also have review mechanisms, although none as formal and independent as the Bank's Inspection Panel. Asian Development Bank, Office of the General Auditor, at <<http://www.adb.org/OGA/default.asp>> (visited Aug. 12, 2002); Asian Development Bank, Operations Evaluation Department, at <<http://www.adb.org/OED/default.asp>> (visited Aug. 12, 2002); Inter-American Development Bank, Office of Evaluation and Oversight, at <<http://www.iadb.org/cont/evo/about.htm>> (visited Aug. 12, 2002). The World Bank Inspection Panel and similar undertakings indicate growing efforts to provide means to civil society to hold international intergovernmental organizations accountable for their actions.

¹²⁰ Art. 33(2) (emphasis added).

¹²¹ Commentaries, Art. 33, para. 4.

¹²² *Id.*

responsibility of a State [is] governed by special rules of international law.”¹²³ This principle applies if there is an inconsistency between two provisions or the intention that one exclude the other. Thus, the articles on invocation “operate in a residual way,”¹²⁴ and do not disturb international legal rights of individuals or nonstate entities under particular treaty regimes.

Certainly, these articles are consistent with the expanding body of international practice detailed above, in which individuals and nonstate entities invoke state responsibility under specific international agreements or even under customary international law. They represent in a sense a small triumph for those members who wanted to take note of the role of individuals and nonstate entities in the international system.

But more could have been done, both to reflect existing international law and to further its progressive development. In particular, part 3 on invoking state responsibility could have included additional provisions that recognized the widespread current practices described here. An article could have confirmed that individuals and nonstate entities are entitled to invoke the responsibility of a state if the obligation breached is owed to them or an international agreement or other primary rule of international law so provides. It also would have been more consistent with emerging trends in modern international law to include an article that recognized that individuals or nonstate entities of one state *may* be entitled in certain instances to invoke the responsibility of another state if the obligation breached is owed to the international community as a whole.

Not surprisingly, the Commission, with the admirable goal of concluding the project expeditiously, did not directly address the issue of who, other than states, may invoke state responsibility. But by largely ignoring the growing and significant international practice in which individuals and nonstate entities are invoking state responsibility, the Commission produced articles that, however noteworthy, are to some extent out-of-date at their inception.

In 1988 Philip Allott wrote, “There is reason to believe that the Commission’s long and laborious work on state responsibility is doing serious long-term damage to international law and international society.”¹²⁵ Allott questioned, among many things, whether the Commission was too influenced by governments to draft appropriate and effective provisions on state responsibility. However, the articles on state responsibility belie his assertion, for they make clear for the first time that states have a right to invoke the responsibility of other states for breaches of obligations owed to the international community as a whole. For the twentieth century, they represent a significant advance. For the twenty-first century, they are still wanting.

¹²³ Art. 55.

¹²⁴ Commentaries, Art. 55, para. 2.

¹²⁵ Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT’L L.J. 1, 1 (1988).