The missing "custom" in the customary international law - Understanding the undue restriction of states' influence in the creation and crystallisation of law of state responsibility

I. Introduction

1. The law of state responsibility occupies a key position in international law. It is not concerned with primary obligations, but is a body of general secondary rules governing 1) when a state is considered to have breached one of its international obligations, 2) the consequences flowing from the breach, 3) the *locus standi* of injured parties, and 4) the form of remedy sought.[1] However the absence of primary obligations means that the developing the law of state responsibility as a set of customary international law ("CIL") rules is extremely complicated, since states are free to determine their own specific secondary rules in their treaties.

2. Certainly, following the publication of the Draft Articles on Responsibility of States for Internationally Wrongful Acts ("Articles on State Responsibility")[2] by the International Law Commission ("ILC") in 2001, there is now a primary point of reference regarding this area of international law. Hence, the creation, crystallisation, and codification of the law of state responsibility as CIL is now clearer.

3. However, this paper argues that the drafting of the Articles on State Responsibility by the ILC, while intended to improve the understanding of the CIL in the area, has in fact led to the restriction of states' influence in the formation of the rules.

4. First, the states' lack of interest and involvement throughout the drafting of the Articles on State Responsibility has led to a lack of states' input into the articles' content. Second, a mutually-reinforcing relationship between the International Court of Justice ("ICJ"), in its position as the "world court", and the ILC as the "codifiers of

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[1] Silvia Borelli, "State Responsibility in International Law", *Oxford Bibliographies* (27 June 2017) <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0031.xml> (accessed 13 December 2017).

[2] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) Supplement No. 10 (A/56/10), found with commentaries on the articles in International Law Commission *Yearbook of the International Law Commission* (2001) volume II, Part Two.

international rules" may have led to the formation and crystallisation of CIL rules without state consent. This trend takes "custom" out of CIL and should not be encouraged.

5. In order to investigate the issue, part II of the paper first provides brief exposition of the commonly accepted roles of the actors involved in the creation and crystallisation of CIL. Part III then analyses the formation process of the Articles on State Responsibility. Part IV evaluates the article on necessity in the Articles on State Responsibility and its treatment by the ICJ and other international courts and tribunals. It concludes that states ought to be more proactive in involving in the drafting process by the ILC in the future, while existing international courts and tribunals should be more circumspect as to the content and source of individual Articles on State Responsibility before relying on them as authoritative sources of law.

II. The creation and crystallisation of CIL

6. As the name suggests, CIL refers to universally binding legal rules which are generated from the individual customs and practices of states.[3] CIL's fluid and constant development is contrasted to treaty law, where states deliberately bind themselves to certain obligations through a written agreement.[4] Nonetheless, as with the formation and consolidation of customs, the creation and crystallisation of CIL is not always clear cut.[5]

7. For the purposes of the discussion here, it is pertinent to start with the provision in the Statute of the International Court of Justice ("ICJ Statute")[6] dealing with CIL. Article 38(1)(b), which instructs ICJ judges on how to apply international law to cases, states that "the Court … shall apply: international custom, as evidence of a general practice

[3] See, *eg*, Malcolm Shaw, *International Law* (Cambridge University Press, 5th Ed, 2003) at pp 68 – 69.
[4] Malcolm Shaw, *International Law*, *id*, at p 88.
[5] See, *eg*, Birgit Schlütter, *Developments in Customary International Law* (Brill, 2010) at ch 1, and Laszlo Blutman, "Conceptual confusion and methodological deficiencies: Some ways that theories on customary international law fail" (2014) 25(2) The European Journal of International Law 529 for the different schools of thought conceptualising the process of creation and crystallisation of the CIL.
[6] United Nations, "1945 Statute of the International Court of Justice", *Centre for International Law* <https://cil.nus.edu.sg/1945-statute-of-the-international-court-of-justice/> (accessed 30 October 2017) ("ICJ Statute").

accepted as law".[7] While the provision does not state clearly that it is defining CIL, and does not clarify whether it is dealing with international customs or CIL, most academics have accepted the provision as citing the two essential elements of CIL, being: 1) general, widespread, and fairly uniform state practice of or conformity to a certain principle, and 2) *opinio juris*, states' belief that this principle is legally binding on them.[8] The phrase "shall apply" in article 38(1)(b) further indicates that the creation and crystallisation of CIL is vested in states, while the ICJ is limited to determining what the CIL is at the time of the decision and applying the law to the facts before it.

8. In investigating a state's contribution to the creation and crystallisation of CIL, one can look at its actions and the presence of *opinio juris*. Regarding the first element, a state's actions can be found in executive and legislative decisions, such as ministerial statements, policies, note verbales, and also resolutions before the United Nations General Assembly ("UNGA") and other regional bodies.[9] On the other hand, the element of *opinio juris* is found in the states' judicial decisions.

9. Where then do the ILC and its drafted articles come into the picture? According to the traditional view, ILC texts (the Articles on State Responsibility in this case) are supposed to be treated by the ICJ as "subsidiary means for the determination of rules of law",[10] which are governed by article 38(1)(d) of the ICJ Statute.[11] An ILC text, if viewed strictly from this perspective, does not form a source of law or CIL but is in fact a tool to determine what the existing CIL is.

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[7] ICJ Statute, *id*, Art 38(1)(b).

[8] See International Law Commission, "Identification of customary international law Text of the draft conclusions provisionally adopted by the Drafting Committee" (A/CN.4/L.869) for a general overview of the two criteria. However, the strictness in the courts' reasoning concerning the existence of these two criteria has differed in various cases and has been subjected to a detailed analysis in Stefan Talmon, "Determining customary international law: The ICJ's methodology between induction, deduction and assertion" (2015) 26(2) The European Journal of International Law 417, where he differentiates the types of reasoning used by the ICJ in arriving at their decisions in the cases of *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/ Netherlands)* ICJ Reports (1969) 3, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* ICJ Reports (2002) 3, and *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* ICJ Reports (1984) 246.

[9] Furthermore, it can also enter treaties with other states, which may either 1) crystallise an emerging widespread state practice into a CIL or, 2) create an obligation, which upon widespread practice by states (due to the large number of signatories) evolves into CIL. See North Sea Continental Shelf cases, *id*, at § 73.

[10] ICJ Statute, *supra* n 6, Art 38(1)(d).

[11] See, *eg*, David D Caron, "The ILC articles on state responsibility: the paradoxical relationship between form and authority" (2002) 96(4) The American Journal of International Law 857 at p 867.

10. However, the creation of the ILC by the United Nations General Assembly ("UNGA")[12] in accordance with Article 13(1)(a) of the United Nations Charter ("UN Charter")[13] may have given the ILC extra authority regarding CIL. Article 13(1)(a) of the UN Charter states that the UNGA "shall initiate studies and make recommendations for the purpose of: … encouraging the progressive development of international law and its codification."[14] Therefore, ILC draft articles and treaties between states which are based on ILC texts may actually be a reiteration of CIL. Viewing these ILC texts as mere equivalents of the work by publicists and the treaties as individual state practice and *opinio juris* does not fully describe the persuasive authority these texts have before international courts and tribunals.[15]

11. Therefore, the ILC occupies an essential role in the realm of CIL, since the UNGA has delegated its CIL codification function to ILC. The ILC, through its members, is supposed to survey state practice and jurisprudence, and codify existing CIL into a consolidated text, which may become a treaty.[16] ILC texts which are not based on CIL may also form the basis for the development of CIL in that direction.[17]

12. However, while this codifying objective of the ILC justifies the persuasiveness and authority of its texts before courts, the other part of its mandate, which is to progressively develop the law, ought to caution arbitrators and judges against overreliance on the texts. As its nomenclature suggests, CIL ought to be based on the customs among states; hence the codification of CIL ought to be focused on state practice and *opinio juris*, while courts should be careful not to usurp states' roles by creating CIL through endorsing new rules proposed in ILC texts.

III. The drafting of the Articles on state responsibility

[12] UNGA, [1947] UNGA 77; A/RES/174 (II) (21 November 1947).
[13] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI art 13(1)(a).
[14] UN Charter, *ibid*.
[15] Fernando Luisa Bordin, "Reflections of customary international law: The authority of codification conventions and ILC draft articles in international law" (2014) 63 International and Comparative Law Quarterly 535 at p 537.
[16] UN Charter, *supra* n 13.
[17] Malcolm Shaw, *International Law* (Cambridge University Press, 6th Ed, 2008) at pp 120 – 121.

13. The task of codifying the law of state of responsibility has been assigned to the ILC since the very beginning of the organisation in the 1950s, and it is not hard to observe states' influence and involvement in this codification project of a span of close to 50 years.

14. For a start, the procedure of the drafting of a text by the ILC already presupposes constant state involvement. The ILC first appoints a Special Rapporteur which researches on the relevant authorities and proposes draft articles.[18] These articles are then debated on by all ILC members before being submitted to a drafting committee, where there is more discussion.[19] Throughout the whole process, states are sent drafts of the articles and allowed to comment on the drafting.[20] Upon completion of the draft, the ILC submits the draft to the UNGA with a recommended course of action.[21] States at the UNGA would then decide whether to participate in a conference which will subsequently lead to a finalisation of the treaty, or to simply take notice of it in the form of a general resolution. [22]

15. From the outset, one can clearly identify two sources of state influence in the drafting of an ILC text. First, the Special Rapporteur while compiling authorities and drafting the articles, is expected to base his reasoning and commentaries on various state practices and jurisprudence in national and international courts.[23] The scope and extent of the ILC draft is already constrained by state practices and *opinio juris*. Second, states may exert a subtler influence on the ILC through their comments on the ILC drafts. While ILC members are impartial and focus on the legal issues, states are the ultimate "client" or constituency the ILC is to serve. An ILC text which does not satisfy the needs or is not accurately reflective of states' practice and jurisprudence would likely remain as a document of abstractions which will not be referred to by courts.

[18] Bordin, *supra* n 15, at p 551.
[19] Bordin, *ibid*.
[20] Bordin, *ibid*.
[21] Bordin, *ibid*.
[22] Bordin, *ibid*.
[23] Statute of the International Law Commission, adopted by UNGA in [1947] UNGA 77; A/RES/174 (II) (21 November 1947), art 20 requires its drafts to contain commentaries containing presentation of precedents and data including on judicial decisions and international treaties.

16. This relationship between states and ILC has been investigated in detail in the development of the law of state responsibility.[24] The first Special Rapporteur for the topic had conceptualised the law of state responsibility almost exclusively on a state's treatment of aliens, but this was turned down by the UNGA as developing states and Eastern European nations considered the focus as "unrealistic and excessively favorable to aliens at a time when these states were struggling for political and economic independence."[25] The second Special Rapporteur Roberto Ago then shifted away from substantive rules and focused instead on the secondary rules concerning responsibility of states.[26] It is observed that only by doing so, did he create "a politically safe space within which the ILC could work and largely avoid the contentious debates of the day."[27] Even among the secondary rules on the law of state responsibility, the ILC had also identified several contentious areas, such as the excuses/justifications for the non-performance of an obligation, lawful state actions which resulted in injury to another state, and dispute settlements, and only the first was incorporated in the eventual Articles on State Responsibility. [28]

17. Having cited the potential and actual influence exerted by states in the drafting of the Articles on State Responsibility, one observes the lost opportunity by states in voicing their opinion towards this ILC draft. Statistics by the International Law Association show that only 21 governments have submitted comments concerning the draft articles and only a few have done so regularly.[29] This relative inaction from the states reduces their influence on the codification and crystallisation of CIL and weakens the states' grip on the development of CIL.

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[24] See Pierre-Marie Dupuy, "A general stocktaking of connections between multilateral dimension of obligations and codification of the law of responsibility" (2002) 13(5) European Journal of International Law 1053, Robert Rosenstock, "The ILC and state responsibility" (2002) 96(4) The American Journal of International Law 792, Mahnoush H Arsanjani, "The codification of the law of state responsibility" (1989) 83 Proceedings of the Annual Meeting (American Society of International Law) 225, and Daniel Bodansky and John R Crook, "Symposium: The ILC's state responsibility articles: Introduction and overview" (2002) 96(4) The American Journal of International Law 773 for a summary of the history of the development of law of state of responsibility in the ILC.
[25] Arsanjani, *id*, at p 225.
[26] See, *eg*, the summary of Ago and subsequent Rapporteurs' two basic premises made in Bodansky and Crook, *supra* n 24, at p 779.
[27] Bodansky and Crook, *id*, at p 780.
[28] Rosenstock, *supra* n 24, at 793.
[29] International Law Association Study Group on the Law of State Responsibility, "First Report", *International Law Association* (1 June 2000) <http://www.ila-hq.org/index.php/study-groups?study-groupsID=32> (accessed 30 October 2017) at para 10.

IV. The treatment of the Articles on State Responsibility by the ICJ and other international courts

18. The relative inaction by the states is not so problematic if the ILC was only tasked with the codification and not the development of the law. However, when it is unclear whether the ILC was attempting to codify the CIL or was proposing a development of the CIL, the failure to make its purpose clear results in a risk that suggestions are taken as codifications, thereby dis-embedding state practice from this CIL's process of creation.

19. This risk cannot be understated. By 31 January 2016, the Articles on State Responsibility has been referred to in 282 decisions in international courts, tribunals and national courts.[30] Given their supposed clarity and precision, combined with extensive legal research, judges and arbitrators may be tempted to simply accept them as CIL. However, upon understanding the nature of ILC, one should carefully scrutinise the article and commentary in question before deciding whether the article is CIL, or only a suggestion as to how the existing CIL should be developed.

20. This was forewarned by academics when the Articles on State Responsibility were first introduced,[31] but unfortunately, numerous decisions have proceeded to accept individual Articles on State Responsibility as CIL without questioning its legal premises.[32] At the stage of finalisation of the Articles on State Responsibility, the ILC Special Rapporteur had already stated that some articles are too controversial and may not be able to secure enough support among states.[33] Yet even in these cases where the ILC had clearly stated that a certain provision is controversial, it is observed that the

[30] United Nations, "Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies", Report of the Secretary-General, A/68/72, 30 April 2013, at para 5, and "Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies", Report of the Secretary-General, A/71/80, 21 April 2016 para 5.
[31] Bodansky and Crook, *supra* n 24, at p 775.
[32] See, *eg*, the cases dealing with defence of necessity by the state in its non-compliance of its international obligations, *Impregilo S.p.A. v. Argentine Republic* ICSID Case No. ARB/07/17 at para 203, *EL Paso Energy International Company v The Argentine Republic* ICSID Case No. ARB/03/15 at para 203, and *Bernhard von Pezold and others v Republic of Zimbabwe* ICSID Case No. ARB/10/15 at para 624.
[33] ILC, Report of the International Law Commission on the Work of Its Fiftieth Session, UNGAOR,53d Sess., Supp. No. 10, UN Doc. A/53/10 (1998) at para. 224

ICJ has still imported the rule wholesale, resulting in the "concretisation" of a rule which was not originally CIL.

21. One such example is the plea of necessity described in article 25(1)(a) of the Articles on State Responsibility, which is pleaded by a state when "the only way a State can safeguard an essential interest threatened by a grave and imminent peril, is, for the time being, not to perform some other international obligation of lesser weight or urgency."[34] In an addendum to the Articles on State Responsibility, the ILC Special Rapporteur had specifically acknowledged the lack of consensus among academics and states concerning this defence of necessity,[35] with some states being concerned with the possibility of a state abusing the provision.[36]

22. In addition to the practical reasons, the states' disapproval of the article was also based on the ground that what the ILC has written in the article is not reflective of CIL. First, it has been observed that the cases cited in the ILC commentary on article 25(1)(a) (other than *Case concerning the Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* ("*Gabcıkovo-Nagymaros*"), [37] which will be discussed below) have set the threshold higher than that of "essential interest" stated in the actual article.[38] According to the previous jurisprudence, the successful pleading of necessity requires a threat which goes to the root of the existence of the nation, compelling it to act in self-preservation.[39] In contrast, while ILC has stated that "necessity will only rarely be available to excuse non-performance of an obligation"[40] the ILC has refused to define what the "essential interest" means, stating that what is essential "depends on all the circumstances, and cannot be prejudged."[41]

[34] ILC, *supra* n 2, at p 80 cmt 1.
[35] James Crawford, Addendum to Second Report on State Responsibility, UN Doc. A.CN.4/498/Add.2, (Apr. 30, 1999) at paras 280 and 283.
[36] Crawford, *ibid*, where the United Kingdom was noted as objecting to the provision due to threshold issues and the potential of abuse.
[37] 1997 ICJ Rep 7.
[38] See Robert D Sloane "On the use and abuse of necessity in the law of state responsibility" (2012) 106(3) The American Journal of International Law 447 at 454-455. Sloane further offers a comprehensive critique on article 25 and argues that there is room for an abuse of the provision based on the current level of acceptance of it as CIL.
[39] Sloane, *ibid.*
[40] ILC *supra* n 2, at p 80 cmt 2.
[41] ILC, *id*, at p 83 cmt 15.

23. In the absence to the contrary, one can assume that pleas for state actions taken to protect an essential interest would be subjected to a lower threshold than pleas for state actions taken to protect its very self-existence. The former is given a wider ambit, since there can be multiple essential interests which require protection,[42] while the latter envisions only one essential interest – the existence of the state itself.[43] This interpretation of the article is further reinforced by the presence of article 25(1)(b) which added that the action should not "seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."[44] If the threshold of essential interest is equivalent to that of self-existence, a state forced to take action to protect its self-existence (and not just interest) should not be required to consider others' interests.

24. Therefore:

> The ILC's definition eschews the existential conception and, unlike classical necessity, does not limit itself to state self-preservation. Instead, it reconceives necessity by, first, expanding the scope of state interests that may qualify as "essential" and, second, subjecting those interests to what is, in effect, a balancing analysis redolent of the choice-of-evils paradigm. This approach may or may not be normatively appealing, but as a descriptive matter, it finds scant support in the precedents cited in the ILC Commentary.[45]

25. Despite the conceptual gaps between Articles on State Responsibility and CIL in the defence of necessity, one notes that the ICJ and other international tribunals have nonetheless been citing article 25 as CIL.[46] Furthermore, the defence of economic necessity has never been successfully pleaded before the appearance of article 25 due

[42] See Roberto Ago, Addendum to the Eighth Report on State Responsibility, UN Doc. A/CN.4/318/Adds.5–7, paras 7 – 11, where the Special Rapporteur rejected the idea of classical necessity based on self-preservation and advocated for a wider range of protection for multiple essential interests.
[43] Sloane, *supra* n 38, at p 459.
[44] ILC, *id*, article 25(1)(b).
[45] See Sloane, *supra* n 38, at p 459.
[46] See, *eg*, the cases in footnote 32 above.

to the previously high threshold (mentioned above), but has since been cited and applied in numerous arbitrations relating to Argentina's fiscal crises.[47]

26. In this, one detects a mutual reinforcing relationship between the ICJ and the ILC, whereby the two cite one another's reasoning as evidence of CIL. In *Gabcıkovo-Nagymaros* where the ICJ had to deal with a plea of necessity, the judgment referred to article 33 of Articles on State Responsibility (the predecessor of the current article 25) and concluded that it was reflective of CIL without referring to other sources.[48] Despite the numerous jurisprudence and state practice to the contrary, the court endorsed both the "essential interest" threshold and also the test on whether the state action would "seriously impair an essential interest" of the state to which the obligations owed.[49] Strangely, ILC then cited this case in its final commentary as support for the propositions stated in article 25,[50] resulting in a circular argument whereby the ILC article is cited in support of a certain proposition in the ICJ judgment, and the ICJ judgment validates the ILC article in turn.

27. This scenario, which an academic describes as "institutional circularity"[51] is furthered by the ICJ advisory opinion of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[52] where the ICJ cited article 25 of the Articles on State Responsibility, its predecessor, and *Gabcıkovo-Nagymaros* before applying the "essential interest" test to the material before it.[53] There was no discussion or investigation as to the nature of state practice and *opinio juris* before the three texts, and the court had simply accepted article 25 as an accurate representation of the CIL on the plea of necessity.

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[47] See, *eg*, *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v Argentina*, ICSID ARB/02/1. See also Tarcisio Gazzini, "Necessity in International Investment Law: Some Critical Remarks on *CMS v Argentina*" (2008) 26(3) Journal of Energy & Natural Resources Law 450 for its discussion on how the arbitration tribunal and ad hoc committee treated article 25 as fully reflective of CIL.

[48] *Gabcıkovo-Nagymaros supra* n 37, at para 51. The ICJ may have assumed as such since both state parties before it accepted the Articles on State Responsibility as reflective of the CIL on necessity.

[49] *Gabcıkovo-Nagymaros*, *id*, at paras 52-53.

[50] ILC, *supra* n 2, at p 82, cmts 11, 15-16, 20.

[51] Sloane, *supra* n 3838, at p 453.

[52] *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice 9 July 2004 <http://www.refworld.org/cases,ICJ,414ad9a719.html> (accessed 30 October 2017).

[53] *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *id*, para 140.

28. In the event that an initial ILC draft article is based on shaky or tenuous observation of state practice and/or *opinio juris*, the author suggests that courts and tribunals have the option of either:

(a) acknowledging such articles as CIL, and hence legitimise its reasoning; or
(b) taking the article in question as what it is (a subsidiary means of identifying what the law is) and forming well-reasoned judgments as to the state of the law.[54]

29. If courts are not careful and vigilant in analysing the elements of CIL and accept ILC texts unreservedly, there is a risk that the courts and the ILC may create a self-perpetrating myth of CIL. The danger is increased in ICJ's case, since ICJ, as the "world court" is considered highly persuasive and authoritative by courts and nations. While an ICJ judgment only has a binding effect on parties involved,[55] its cases can be referred to in subsequent ICJ judgments.[56] This results in an indirect effect on the rights and obligations of all states interested in that area of law. States are then incentivised or compelled to modify their behaviour in order not to be found guilty, hence behaving in the manner as contemplated by the ILC.

30. The ILC (as mentioned above) has understood the controversial nature behind some of its work in the Articles on State Responsibility, hence recommending that the UNGA only take note of it in a resolution instead of making it a treaty. Several states have also expressed their position that the Articles on State Responsibility are not suitable for codification.[57] This reflects the states' view that it may be better for the law on state responsibility to be developed flexibly. A better process may be through bilateral, and multilateral state interactions, instead of through international courts' application of a codified text. However, by presuming that the Articles on State Responsibility are fully reflective of CIL, courts may be imposing the norms (which are different from actual CIL) on states even when they have evidenced the desire not to be bound. The states' perspective, as evidenced through their practice and *opinio juris*, would then lose its

[54] This is based on the article 38(1)(d) of the ICJ Statute.
[55] ICJ Statute, *supra* n 6, art 59.
[56] ICJ Statute, *id*, art 38(1)(a).
[57] James Crawford, Fourth Report on State Responsibility, UN Doc A/CN.4/517 and Add. 1 at para 23.

influence on the formation and crystallisation of CIL. Courts' judgments would then be based on what the ILC thinks is how states operate, when states may be behaving differently.

V. Conclusion

31. The author has sought to evaluate the states', ILC's and ICJ's role in the law-making process of the law on state responsibility through a discussion on the drafting process, content, and reception of the Articles on State Responsibility.

32. While states had the chance to express their opinions and views through the drafting process of the Articles on State Responsibility, it is observed that most states have been mostly passive in the drafting of the ILC text, perhaps trusting in the wise men in both the ILC and international courts to codify the law according to actual state practice.

33. The absence of state involvement may not have been that problematic if the ILC was only tasked with codification of CIL, but its mandate to also progressively develop the law meant that the Articles on State Responsibility should be viewed as a treatise on the law of state responsibility instead of a treaty despite its purported clarity and certainty.[58]

34. The risk and danger of courts taking ILC's innovation as codification of ILC has not gone unnoticed by academics,[59] but has been ignored by the many courts and tribunals' accepting certain controversial Articles on State Responsibility as CIL unreservedly. The ICJ also runs the danger of unduly influencing state behaviour and hence CIL by endorsing ILC texts as CIL without actively questioning their premises.

35. Given the current situation, the author advises more circumspection in courts when it comes to the Articles on State Responsibility. There should be a careful comparison of the specific article in question with the pre-existing CIL rule found in the legal precedents such as international judgments and treaties before a decision is made to whether simply apply the CIL, or break from precedent and follow the ILC's suggestion to bring the law forward.

[58] Caron, *supra* n 11, at p 868.
[59] Caron, *id*, at p 872.

36. Finally, it is perhaps wise to heed the advice of one academic critical of the ILC's drafting and the ICJ's subsequent wide acceptance of the Articles on State Responsibility: [60]

> The [Articles on State Responsibility] represent the end of a long process … To apply them correctly, decision makers must avoid a simple reading of the articles but, instead, must consult the commentaries and reports for each article, which illuminate the practice underlying the rule, the discussions of the ILC, and the comments of various governments. Together these sources bring life to the articles and reveal the degree of consensus.

[60] Caron, *id*, at p 873.