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"THE SECOND ROAD": STATE RESPONSIBILITY AND THE EMERGENCE OF THE DISTINCTION BETWEEN PRIMARY AND SECONDARY RULES IN THE INTERNATIONAL LAW COMMISSION

"THE SECOND ROAD": RESPONSABILIDADE DO ESTADO E A EMERGÊNCIA DA DISTINÇÃO ENTRE REGRAS PRIMÁRIAS E SECUNDÁRIAS NA COMISSÃO DE DIREITO INTERNACIONAL

George Rodrigo Bandeira Galindo*

RESUMO: Os advogados internacionais habitualmente presumiram que a distinção entre as regras primárias e secundárias no direito de responsabilidade do Estado é necessária. Este artigo investiga as origens da distinção desde o início dos trabalhos da Comissão de Direito Internacional sobre o tema até sua adoção formal pelo então Relator Especial Roberto Ago e, posteriormente, pela própria Comissão. A adoção da distinção é um resultado claro da vontade de extirpar as considerações políticas de um projeto de codificação das normas jurídicas internacionais, bem como de corroborar uma divisão entre forma e substância no âmbito da responsabilidade do Estado. Uma historiografia da distinção é necessária a fim de fornecer elementos para futuras reflexões sobre a codificação do direito internacional e para afirmar que uma concepção das regras de responsabilidade do Estado como secundárias depende do tempo.

PALAVRAS-CHAVE: Regras primárias e secundárias. Comissão de Direito Internacional. Responsabilidade do Estado.

ABSTRACT: *International lawyers have usually assumed that the distinction between primary and secondary rules in the law of state responsibility is a necessary one. This article investigates the origins of the distinction since the beginnings of the International Law Commission's work on the topic until its formal adoption by the then Special Rapporteur Roberto Ago and, lately, by the Commission itself. The adoption of the distinction is a clear result of the wish to extirpate political considerations from a project of codification of international legal rules as well as to corroborate a divide between form and substance in the realm of state responsibility. A historiography of the distinction is necessary in order to provide elements for future reflections on the codification of international law and to assert that a conception of state responsibility rules as secondary ones is contingent upon time.*

KEYWORDS: *Primary and Secondary Rules. International Law Commission. State Responsibility.*

INTRODUCTION

International lawyers have usually assumed that the distinction between primary and secondary rules in the law of state responsibility is a necessary one. Such assumption, however, tends not only to an oversimplification of the distinction but a de-politicization of state responsibility rules.

* Professor Associado da Universidade de Brasília, Consultor Jurídico do Ministério das Relações Exteriores e Membro da Comissão Jurídica Interamericana da Organização dos Estados Americanos (OEA). Possui graduação em Direito pela Universidade Federal de Pernambuco (1998), mestrado em Direito pela Universidade de Brasília (2001), doutorado em Relações Internacionais pela Universidade de Brasília (2006), pós-doutorado em direito internacional pela Universidade de Helsinki (2010) e pela Universidade de Bremen (2014).

It is redundant to state the importance of the chapter of state responsibility for international lawyers. Such importance is due to the fact not only that, as famously put by Max Huber, "responsibility is the necessary corollary of rights,"[1] but also because, if we pay regard to its long consideration in the codification works of the United Nations International Law Commission (ILC), we will conclude that "the topic was anything but innocent from a political point of view."[2]

The entanglement between law and politics is both one of the leading causes of the importance of the issue of state responsibility to the practice of international law as well as the reason for several controversies around it.

Among the aspects of the topic that is not enough problematised from the perspective of the necessary connection between law and politics is the one related to the distinction between primary and secondary rules.[3]

Since at least the Italian jurist, Roberto Ago, was elected Special Rapporteur for State Responsibility in the ILC, scholarship in this field has progressively taken for granted that state responsibility rules have nothing to do (or should have nothing to do) with substantive rules.[4] Instead, state responsibility rules would be only concerned with the determination about the violation of an international obligation and the consequences arising due to such violation.

Although the choice for encapsulating state responsibility rules in the realm of secondary rules may seem a technical issue – or the only framework in which codification projects in this domain can be successful, as Ago suggested in order to justify the methodology he was trying

[1] AD HOC ARBITRATION. Affaire des Biens Britanniques au Maroc Espagnol (Great Britain v. Spain (Spanish Zone of Morocco)), Judgment of 23 October 1924. *Reports of International Arbitral Awards II*. New York: United Nations, 2006, p. 641.

[2] ALLOT, Philip. State Responsibility and the Unmaking of International Law. *Harvard International Law Journal,* Cambridge, v. 29, n. 1, 1988, p. 3.

[3] Although authors disagree about the importance of the distinction to the law of state responsibility, they usually do not pay regard to its political implications. See, for example, David, for whom "it concerns a distinction the object of which was initially a technical one, but whose application has at times seemed artificial." DAVID, Eric. Primary and Secondary Rules. In: CRAWFORD, James; PELLET, Alain and OLLESON, Simon (Eds.). *The Law of International Responsibility*. Cambridge: Cambridge University Press, 2010, p. 27; and P.M. Dupuy, who uses the distinction (in the sense proposed by H.L.A. Hart) as a fundamental methodological pillar in his General Course given at the Hague Academy of International Law, but sees its implications strictly to the international legal system: DUPUY, Pierre-Marie. L'Unité de l'Ordre Juridique International, *Recueil des Cours de l'Académie de Droit International de la Haye*, La Haye, v. 297, 2002, p. 9-490.

[4] Some authors have mentioned a legal scholar's "habit of referring to the law of state responsibility as a set of secondary rules." LINDERFALK, Ulf. State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System. *Nordic Journal of International Law*, Lund, v. 78, n. 1, 2009, p. 54.

to sell to his colleagues at the ILC – it has profound political consequences, in the sense that it affects our conceptions of what constitutes a good or bad international community.

The association of state responsibility rules with secondary ones has often meant that advancing in the split between the general and the particular,[5] as well as the form and the substance is something good for the development of international law. More than that, the distinction often means that state responsibility rules belong to the domain of the legal, with no or scarce interference from the domain of politics.

The distinction between primary and secondary rules in the law of state responsibility has also produced a kind of reading of the past that emphasises the heroism of some characters and a favourable judgment of their choices. Hence, in many senses, the historiography of state responsibility is based upon teleological narratives and on the idea of progress.[6]

[5] On this issue, see GOURGOURINIS, Anastasios. General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System. *European Journal of International Law*, Firenze, v. 22, n. 4, 2011, p. 993-1026.

[6] One can think, for example, of James Crawford's criticism of the treatment some classic writers devoted to state responsibility for its lack of "any systematic order basis" and its characterization as merely being "an incident of substantive law." CRAWFORD, James. *State Responsibility: The General Part*. Cambridge: Cambridge University Press, 2013, p. 3. Such view suggests that the distinction between formal and substantive rules (or secondary and primary rules) is an inevitable path to be taken by international lawyers. Combacau and Alland consider that the previous focus, by the ILC, on damages caused to aliens, was an "error", naturalizing a distinction that comes from a specific methodological approach chosen among many. COMBACAU, J. and ALLAND, D. "Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations. *Netherlands Yearbook of International Law*, Amsterdam, v. 16, 1985, p. 83. For Pellet, the adoption of the distinction is such an improvement that deserves the label of "genius": "Distancing himself from this debate [on the responsibility of the state for injuries caused to aliens] was Ago's first stroke of genius." PELLET, Alain. The ILC's Articles on State Responsibility for International Wrongful Acts and Related Texts. In: CRAWFORD, James; PELLET, Alain and OLLESON, Simon (Eds.). *The Law of International Responsibility*. Cambridge: Cambridge University Press, 2010, p. 76. Gaja considers the distinction "[o]ne of the major contributions of Roberto Ago to the study of the international responsibility of States as Special Rapporteur of the International Law Commission on State Responsibility" and "a highly innovative step". GAJA, Giorgio. Primary and Secondary Rules in the International Law on State Responsibility. *Rivista di Diritto Internazionale*, Milano, v. 98, n. 4, 2014, p. 981. A recent trend of scholarship, however, have tried to demystify a number of aspects related to state responsibility. That is the case, for example, of Kathryn Greenman's study on the historiography of state responsibility for acts of rebels in Latin America. Greenman's article is a well-documented research that reveals strong ties between doctrine, arbitration practice and colonialism in the Americas. See GREENMAN, Kathryn. Aliens in Latin America: Intervention, Arbitration and State Responsibility of Rebels. *Leiden Journal of International Law*. Leiden, v. 31, n. 4, 2018, p. 617-639. A brilliant example of this new critical input in the historiography of state responsibility is: NISSEL, Tzvika Alan. *A History of State Responsibility: The Struggle for International Standards (1870-1960)*. 436p. Doctoral Dissertation – Faculty of Law, University of Helsinki, 2016. Nissel's impressive research encompasses an almost one hundred-year range of theory and practice of state responsibility, with an acute sense for establishing links between broad transformations in the international order and developments in the law of state responsibility. A good summary of his Dissertation may be found in NISSEL, Alan. The Duality of State Responsibility. *Columbia Human Rights Law Review*, New York, v. 44, n. 3, 2013, p. 793-858.

Here, the stage of the organization of state responsibility rules today is seen as better than in the past. The finishing by the ILC of its work of codification on the issue, in 2011, is commonly regarded as the apex of the progress made, projecting the past as a less evolved stage of state responsibility rules.

Although the issue of the distinction between primary and secondary rules could be addressed in many ways, including by means of a deep investigation of its intellectual origins in different authors, my aim is far more restricted and less ambitious. In this article, I would like to focus on how the distinction between primary and secondary rules emerged in the very works of the ILC on the topic of state responsibility. My goal is to revolve the debates, within the Commission, which gave rise to the distinction. Such effort can certainly highlight the fact that that split was one among other choices that could be made by the members of the Commission. If this is so, it is dangerous to naturalise it as the only (or even the best) way to conceive state responsibility rules. Such naturalization is something that states should be aware of when (and if) they decide to craft a convention on the responsibility of states in the future. Perhaps the challenging of such naturalization can stimulate widespread research on such important topic.

Any investigation on the emergence of the distinction between primary and secondary rules in the law of state responsibility, within the ILC, has inevitably to deal with its "beginnings". In this article, I use the term "beginnings" in a mere chronological sense. I do not imply that, at the level of ideas, the "beginnings" can easily be distinguished from present times. Although contexts in which meanings emerge are invariably chronologically distinguishable, the meaning we attribute to a given concept may have a higher resemblance to another that is farther than one that is closer in time.[7] Such caveat is necessary because, finding the beginnings of a concept in a way as to keep the past entirely apart from the present is an escape to reify it, to deny that different meanings of a given concept in the past affects the way we understand those very concepts.

This article is divided into two parts. In the first, I will discuss many of the aspects of the methodology chosen by the ILC to approach the topic of state responsibility since its creation

[7] Different theorists of history have emphasized such an idea. See, e.g., Koselleck: "Because they can be applied again and again, basic concepts accumulate long-term meanings that are not lost with every change in regime or social situation." KOSELLECK, Reinhart. A Response to Comments on the Geschichtliche Grundbegriffe. In: LEHMANN, Hartmut and RICHTER, Melvin (Eds.). *The Meaning of Historical Terms and Concepts: New Studies on Begrifsgeschichte*. Washington, D.C.: German Historical Institute, 1996, p. 66.

until the beginning of the 1960s. In the second part, I will trace some lines on how the ILC finally came to the adoption of the terms "primary" and "secondary" rules in its works on state responsibility, primarily by the influence of Roberto Ago. Finally, conclusions will be presented.

1 THE ILC'S FIRST YEARS AND THE TOPIC OF STATE RESPONSIBILITY

For the first session of the International Law Commission, in 1949, the Secretary-General of the United Nations provided a lengthy memorandum. Only in 1960, the authorship of the piece was attributed to Hersch Lauterpacht.[8]

On the part devoted to state responsibility, the memorandum already shows a tension that would be present in the ILC discussions on the topic until, at least, 1963. Recalling previous codification projects, it recognised that state responsibility for damages caused to the persons and property of aliens covers "perhaps the major part of the law of State Responsibility," constituting "in practice the most conspicuous application of the law of responsibility of States." At the same time, it stated that "it is clear that that branch of international law transcends the question of responsibility for the treatment of aliens." It then urged the ILC to deal with issues such as the criminal responsibility of states and individuals, prohibition of abuse of rights, forms of reparation, penal damages, and responsibility for states activities in the commercial and economic fields.[9]

Such tension was somehow reflected in the 1949 session debates.

Besides state responsibility, the treatment of aliens was another topic considered as apt for codification. In such context, a first debate emerged on the ILC. The Commission's Chairman, Manley Hudson, proposed to link up the issues, "since the State responsibility visualised was connected with damages caused to aliens." Such position, however, was rejected by other members. For Scelle, for example, "the question of State responsibility was subordinate to that of the treatment of aliens since the responsibility only arose if the State was under an obligation

[8] Elihu Lauterpacht recalls that history in the Collected Papers of his father, where a reproduction of the memorandum can be found. See LAUTERPACHT, Elihu (Ed.). *International Law: Being the Collected Papers of Hersch Lauterpacht, v. 1*. Cambridge: Cambridge University Press, 1970, p. 445.
[9] *Ibidem*, p. 512-514.

to treat aliens in a certain way." Despite the Chairman's position, the Commission decided to keep with the topic of treatment of aliens separated from state responsibility.[10]

A second debate had to do with the desirability of keeping the topic of state responsibility itself as one apt for codification. Three options were discernible at the time. For the first, advanced by Cordova, the Commission should retain the issue, but not in a limited way as to responsibility for damages caused to aliens, but studying "all infringements of the duties incumbent on States." A second position, espoused by François, recalling the failure of the attempt of codification in such domain in the 1930 Hague Conference, opted for not considering the topic as a ready one. A third position, advocated by Brierly, Spiropoulos, and Scelle, was for retaining the topic due to its importance, but not mentioning if it should be focused on damages to aliens or on "all infringements of the duties incumbent on States." The third position prevailed, and the topic of state responsibility was retained with no further qualifications.[11]

If we connect the discussions on the two topics, it is clear that, for some members, the topic of state responsibility should be addressed under the framework of damages caused to aliens.

In 1953, the General Assembly approved a resolution requesting the ILC to "undertake the codification of the principles of international law governing State responsibility."[12] However, that resolution, initially proposed by the Cuban Delegation, provided no orientation as to the methodology to be followed.

In 1954, Francisco V. Garcia Amador, the member from Cuba, presented a memorandum to the ILC with several considerations about the resolution approved by the General Assembly. On that memorandum, he raised some issues that would inform many of his reports in the following years as Special Rapporteur for state responsibility. Some of them were: the need to recognise the subjectivity of individuals and their locus standi in international courts, the growing influence of human rights and the distinction between merely wrongful and punishable acts. He also envisaged a study on state responsibility that encompassed not only damages caused to aliens but also damages caused directly to states. It is true that he saw fewer difficulties in matters regarding damages caused to aliens, because, in such domain, there were more developments in doctrine as well as in practice. More, he thought that most of the

[10] ILC. Summary Records of the First Session. *Yearbook of the ILC* v. 1, 1949, p. 46.
[11] *Ibidem*, p. 49-50.
[12] UNITED NATIONS. GENERAL ASSEMBLY. *Request for the Codification of the Principles of International Law Governing State Responsibility*, A/RES/799(VIII), 7 December 1953.

fundamental principles of state responsibility could be found in the domain of damages caused to aliens. However, he did not exclude the codification work beyond that reach. His approach is better described as "a gradualist" one.[13]

Due to its workload, only in 1955 the ILC began the study of state responsibility by choosing Garcia Amador as the Special Rapporteur for the topic.[14] No substantive discussions, however, took place at that year on the topic.

Garcia Amador presented his first report in 1956. In its first pages, he admittedly assumed a "liberal" attitude towards codification, in the sense that "it is necessary to change and adapt traditional law so that it will reflect the profound transformation which has occurred in international law." By presenting the past attempts to codify the law of state responsibility, he saw the role of the ILC as to "continue and complete the work of predecessor organizations."[15] So, despite his "liberal" conception about codification, his methodology was one of continuity.

Important for the Special Rapporteur is what he calls "function of the principles governing state responsibility." For him, such function was, "in a certain sense," even more important than the content of state responsibility itself. Quoting authors such as Dunn, Jessup, Eagleton, and Eustathiades, he mentions the connections of the topic with the "possibility of maintaining a unified economic and social order for the conduct of international trade", "political influence in certain countries", "scramble for markets", "imperialism", "dollar diplomacy", effects of international wrongful acts in the "whole community". Such elements were essential for him to raise the idea that the function of international law had changed as to "protect the rights and interests of its other subjects who may properly claim its protection."[16]

Taking into regard such importance Garcia Amador attributed to the "function" of state responsibility, he admittedly envisaged in state responsibility a political function beyond the confines of what would be a "strict legal approach."

The report develops the issues brought by his previous memorandum and reaffirms the gradual approach: "[t]he Commission, as it has done in the case of other topics, should adopt a gradual approach, codifying first that part of the topic which is most ripe for codification and

[13] MÜLLER, Daniel. The Work of García Amador on State Responsibility for Injury Caused to Aliens. In: CRAWFORD, James; PELLET, Alain and OLLESON, Simon (Eds.). *The Law of International Responsibility*. Cambridge: Cambridge University Press, 2010, p. 70.
[14] ILC. Summary Records of the Seventh Session. *Yearbook of the ILC*, v. 1, 1955, p. 190.
[15] ILC. International Responsibility: Report by F.V. García Amador, Special Rapporteur. *Yearbook of the ILC*, v. 2, 1956, p. 176-177.
[16] *Ibidem*, p. 184.

which, at the same time, should receive priority in conformity with the terms of resolution 799 (VIII) of the General Assembly. The "responsibility of States for damage caused to the person or property of aliens would appear to fulfill these two conditions".[17]

Garcia Amador's first report gave rise to many discussions in the ILC's plenary meetings. Apart from one member (Hsu) – for whom the scope of the report was too restricted and should be broadened[18] - the strongest criticisms were not raised against its methodology, but against the introduction by the report of issues such as state criminality, individual as a subject of international law and human rights. Members such as Zourek criticised the report for going too far and dealing with "aspects of international responsibility in general." Spiropoulos stated that it "covered the entire field of state responsibility."[19] Fitzmaurice explicitly supported the special rapporteur's view of adopting a gradual approach.

Because the vast majority of the Commission did not oppose the gradual approach, it would be expected that Garcia Amador would follow it in his second report. That was what happened in 1957.[20]

The membership in the ILC was renewed that year. Three of the new members would assume, in the years to come, a prominent role in criticizing the focus on responsibility for damages caused to aliens: Grigory Tunkin, Alfred Verdross and Roberto Ago.

One of the first interventions in that year's debates shows that Garcia Amador's approach was not yet a problem to the Commission. Amado, from Brazil, congratulated him for removing "the tendency to undue broadening of the concept of responsibility."[21]

It was only on the second intervention that the stage started to be set to a more intense debate, although not yet related to the methodology of the study. For Padilla Nervo, "the doctrine of State responsibility became a legal cloak for the imperialist interests of the international oligarchy during the nineteenth century and the beginning of the twentieth." Specifically related to the methodology, Hsu - the same and only member that criticised Garcia Amador for not broadening the scope of his first report in the 1956 debates – emphasized that "the Special Rapporteur was on the right track."[22]

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[17] *Ibidem*, p. 221.
[18] ILC. Summary Records of the Eight Session. *Yearbook of the ILC*, v. 1, 1956, p. 232.
[19] *Ibidem*, p. 233, 237, 241.
[20] ILC. International Responsibility: Second Report by F.V. García Amador, Special Rapporteur. *Yearbook of the ILC*, v. 2, 1957, p. 104.
[21] ILC. Summary Records of the Ninth Session. *Yearbook of the ILC*, v. 1, 1957, p. 154.
[22] *Ibidem*, p. 155-156.

The first member to undoubtedly challenge, in the 1957 discussions, Garcia Amador's approach was Roberto Ago. In many ways, Ago's position directly influenced the debates because he introduced the question of the methodology taken by the special rapporteur and, thus, tried to re-open an issue that was, at least for the majority of the ILC in its previous session, already closed: "[t]he Special Rapporteur had concentrated, in accordance with the Commission's recommendation, on the question of the responsibility of the State for damage caused in its territory to the person or property of aliens, a very important aspect of the problem, and one which had been given long consideration by doctrine. Its codification would be a most useful task. Though it was an aspect that lent itself to separate treatment, it was, as the Special Rapporteur had himself discovered, impossible to study it without raising all the fundamental problems and defining all the concepts connected with the general notion of State responsibility".[23]

If we compare Ago's statement with that of Hsu in 1956, the former is the first to put in a clear way a distinguishing between a "general notion of State responsibility" and "damage caused in its territory to the person or property of aliens." Moreover, he admits that the Special Rapporteur's approach was "in accordance with the Commission's recommendation."[24]

In the next meetings during the same session, many members tried to make correlations between the issue of state responsibility and questions relating to colonialism and eurocentrism in international law and the emergence of different economic systems. Thus, "international law was no longer the almost exclusive preserve of the peoples of European blood" (Pal). The codification process should not "merely ensure the protection of vested interests or the maintenance of the status quo" (El Erian), and "[p]resent-day international law could not be a system of legal rules imposed by States belonging to one economic system on States belonging to another" (Tunkin).[25] Apparently replying to those statements, Fitzmaurice was clear about the need to separate politics from law and stressed that the role of the ILC belonged to the latter domain. He thus stated: "the subject was one which immediately touched off strong emotional

[23] *Ibidem*, p. 157.
[24] Such statement is in clear contradiction with the narrative Ago would craft, years later, of the Garcia Amador's years: "the Special Rapporteur submitted a second report which was expressly limited, even in its title, to responsibility of the State for injuries caused in its territory to the person or property of aliens." ILC. First Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur. *Yearbook of the ILC*, v. 2, 1969, p. 133.
[25] ILC. Summary Records of the Ninth Session, *Op. Cit*., p. 158, 161-165.

charges, and the tendency to approach it from a political and ideological standpoint, entirely inappropriate in a commission of jurists, appeared to be irresistible."[26]

Ago's second intervention in the debates, while trying to put some order in the discussions, and possibly with a "commanding demeanor,"[27] epitomises his whole methodology for the codification of the law of state responsibility. For him: "Some speakers had been more concerned with the essentially technical and legal side of international responsibility […]; others had emphasized the political aspects of certain questions which had been dealt with by the Special Rapporteur, and which concerned only indirectly the question of responsibility. As far as he could see, the Commission had the choice of three courses. Firstly, it could adopt the radical course of stating that, for various reasons, the subject was not ripe for codification. Secondly, it could deal with the subject covered by the report in all the aspects touched on by the Special Rapporteur, following the tendency, found in many works on international responsibility for damages suffered by foreigners, to widen the subject to include all the substantive rules regarding the treatment of aliens. There was, of course, nothing to prevent the Commission's adopting that course, but he himself doubted the wisdom of undertaking such a wide task, which would involve considering and defining all the obligations of States towards aliens before studying the consequences of violations thereof, and settling not only the technical and legal problems involved but the political ones as well though the latter might not present such insuperable difficulties as some supposed. Thirdly, the Commission could, as advocated by the Chairman, leave all the matters concerning the definition of the obligations of the State as to the conditions of aliens, and confine itself to the examination of the questions within the framework of responsibility proper, i.e., of the consequences of an international illicit act committed in the field under consideration. Of those three courses, Mr. Ago preferred the third, which would enable the Commission to do a useful job without engaging in a debate on the treatment of aliens, a subject on which it might prove sometimes impossible to reach agreement, and which, in any case, could usefully be allowed to evolve further before attempting to codify it."[28]

The richness of such intervention is clear for the historiography of the law of state responsibility. At this point, however, two points need to be stressed.

[26] *Ibidem*, p. 163.
[27] NISSEL, Alan. The Duality of State Responsibility, *Op. Cit.*, p. 827.
[28] ILC. Summary Records of the Ninth Session, *Op. Cit.*, p. 167.

Ago makes a distinction, in the project of codifying rules on state responsibility, between positions that are legal and technical from those that are political in nature. He does not only square himself on the "legal and technical side," but puts Garcia Amador's approach on the "political" side. Here, he makes use of a dichotomy that makes his ideas on the codification project distinct from those of Garcia Amador at the level of the fundamentals. Although delimiting the space of law and politics is in itself a political project, nothing suggests that, in making such statement, Ago had a "hidden" political agenda. However, such guidance would have consequences regarding delimiting a field of study and excluding a perspective more "politically-oriented" on the topic.

Second, Ago seems to misrepresent the position of the Chairman; he is, in fact, projecting his own position on the path to be taken in the codification process by referring to the position "advocated by the Chairman."

Jaroslav Zourek, the then Chairman of the ILC, criticised the rapporteur's "attempt to cover the entire subject of the legal status of aliens in all its substantive aspects, instead of contenting himself with the technical rules that were usually regarded as exhausting the subject of State responsibility." In this context, he states that: "the Commission should study only the circumstances in which the State could be held responsible for an act which gave rise to damages and a claim from a foreign State, without engaging in a study of the rules governing the juridical condition of foreigners on the territory of the State".[29]

In other words, the Chairman seems to visualise a codification project that does not lay down rules that deal with "juridical condition of foreigners," but that is, at the same time, in the domain of damages caused to aliens.[30] Although Ago's intervention was dealing both with the oppositions between general and particular, and substance and form, Zourek is only targeting the second one. It is possible to come to such conclusion by the following statement, made by François, who criticised not article 1 of Garcia Amador's proposed rules (that defined state responsibility concerning damages caused to aliens), but article 6, that, in his vision, defined violations of fundamental human rights).

Indeed, it is plausible to admit that, at that session, there were four, and not three (as put by Ago), the positions about the codification process on the part of the members of the ILC; the

[29] *Ibidem*, p. 162.
[30] This is so, since in another intervention, just before that of Ago, the Chairman gives examples of state responsibility regarding damages to aliens with no caveats. *Ibidem*, p. 166.

fourth was for keeping the focus on damages caused to aliens without providing any substantive rules.

That fourth position was followed by some members (Amado, Spiropoulos), and also the Commission's Secretary (Liang), that focused only on the necessary distinction between rules of substance and those of responsibility (procedural).[31] Although some emphasised the difficulty in advancing such division in practice (Spiropoulos and Fitzmaurice).[32]

Other members explicitly adopted the third path – followed by Ago – but with a nuance that would be very relevant for the discussions to come, that of "dealing with any new principles enunciated in the Charter on which no clear rules of international law existed" (El-Erian), something that was, although not clearly, in the statement made by Tunkin.[33]

During the debates, Garcia Amador himself complained about the bewildering ideas that were being brought by the members. In his words, "[h]e found himself, nonetheless, in an unenviable position because of the contradiction between certain criticisms." In a statement that could be seen as a response to Ago, he did not deny a "political consideration" in state responsibility, but found that "such difficulties was no reason for abandoning the task of seeking out its basic principles." He also addressed the proposals of delimiting substantive and procedural aspects and stated that they were interrelated.[34]

At the end of the debate, the Chairman, addressing to a question posed by Matine-Daftary that the Commission had to decide if it would be restricted to the issue of "protection of aliens" or would broad the study to encompass "all types of international obligations," answered that it was "settled, since the title of the draft referred only to injury to the person and property of aliens."[35]

There were members, although, in the minority, that showed full approval for Garcia Amador's "choice of topic and method of approach" and opposed the "undue limitation of scope" of his next report (Yokota).[36]

[31] *Ibidem*, p. 167-168. Spiropoulos' position is clear when he expressly rejects giving away with the focus on damages caused to aliens. *Ibidem*, p. 170.
[32] *Ibidem*, p. 168, 169.
[33] *Ibidem*, p. 166, 169.
[34] *Ibidem*, p. 169-170.
[35] *Ibidem*, p. 171.
[36] *Ibidem*, p. 160, 169.

The 1957 debates show that there was growing opposition to the approach followed by Garcia Amador. However, because of their variety, a common or majoritarian position by the ILC could hardly be envisaged.

Thus, in his third report (1958), Garcia Amador did not change in any relevant way the approach he decided to take since his first report, stressing the difficulty of separating substantive and procedural aspects in the topic.[37]

In 1958, however, the ILC did not discuss, not even cursory, Garcia Amador's report. The focus on other topics was the official reason for that.

In the following year, the special rapporteur presented his fourth report.[38] However, the debates among members were formally focused on discussing the draft articles on state responsibility prepared by Harvard Law School, because the ILC's Secretary, since the beginnings of the Commission's work on the topic, had established contacts with that institution.

For Tunkin, both the Harvard's articles as well as the reports by the Special Rapporteur did not deal with state responsibility properly, but with rights of aliens. He also urged for the ILC to take the views of socialist states as well as of new states of Asia and Africa on state responsibility. In a similar vein, the Yugoslavian member, Milan Bartoš, linked up the approach of responsibility for damages caused to aliens with colonialism and imperialism.[39]

The Iranian member, Matine-Daftary, was direct in explaining an additional reason why the Special Rapporteur's reports had not been thoroughly discussed so far: "the Special Rapporteur's draft had been postponed not only owing to lack of time, but also because the draft was based on purely European standards of justice."[40] Perhaps that was only a partial explanation because many other members had reservations towards the reports for different reasons. In any case, it seems to confirm that the continuous postponement was in Pellet's words, "a polite representation of a more complex reality."[41]

[37] ILC. International Responsibility. Third Report by F.V. García Amador, Special Rapporteur. *Yearbook of the ILC*, v. 2, 1958, p. 48-49.
[38] ILC. International Responsibility. Fourth Report by F.V. García Amador, Special Rapporteur. *Yearbook of the ILC*, v. 2, 1959, p. 1.
[39] ILC. Summary Records of the Eleventh Session. *Yearbook of the ILC*, v. 1, 1959, p. 149-150.
[40] *Ibidem*, p. 149.
[41] PELLET, Alain. The ILC's Articles on State Responsibility for International Wrongful Acts and Related Texts, *Op. Cit.*, p. 75.

Alfred Verdross urged for the separation of the topics of "international responsibility in general" and the "rights of aliens".[42] He was immediately seconded by Roberto Ago, for whom, "the test of the State's responsibility was not the injury to the alien, but the violation of an obligation."[43]

However, even after Verdross and Ago's interventions with a more "technical" tone, the political considerations continued being a point. Thus, for El-Khouri, the Harvard draft articles "were reminiscent of the capitulations system applied in the territories of the Ottoman Empire in the nineteenth century."[44]

Still, in those cursory debates of 1959, some seemed to support the idea of still focusing the codification works on damages caused to aliens. That is seen in Amado's and the Secretary's positions, and possibly in Zourek's as well.[45]

The presentation of a draft made by an American institution such as the Harvard Law School fueled many suspicious feelings in a topic that had already been accused of being supportive of imperialist and colonialist ideas.

Garcia Amador's fifth report[46] was discussed in the 1960 session, which counted with the presentation of Mr. Gómez Robledo, representative of the Inter-American Juridical Committee. He reported the works of that Committee, that was entrusted by the Tenth Inter-American Conference of 1954 to study the American Continent's contribution to the development and codification of the principles of state responsibility. Louis Sohn also spoke about the changes made in the Harvard draft taking into regard the debates on the ILC in the previous year.[47]

Two of the first to intervene in the debates were, again, in sequence, Verdross, and Ago. Remarking that the Harvard draft and the special rapporteur's reports, dealt indistinctively with state responsibility and treatments of aliens, both pleaded (again) for the ILC to separate the issues in its works.[48] Tunkin also argued for the separation of issues, although he added that

[42] ILC. Summary Records of the Eleventh Session, *Op. Cit.*, p. 150.
[43] *Ibidem*, p. 150.
[44] *Ibidem*, p. 151.
[45] *Ibidem*, p. 151-152.
[46] ILC. International Responsibility. Fifth Report by F.V. García Amador, Special Rapporteur. *Yearbook of the ILC*, v. 2, 1960, p. 41.
[47] ILC. Summary Records of the Twelfth Session. *Yearbook of the ILC*, v. 1, 1960, p. 264-268.
[48] *Ibidem*, p. 277, 278.

"[i]n approaching the codification and progressive development of international law, the primary consideration must be the laws of the development of human society."[49]

Garcia Amador replied to Tunkin by stating that: "his reports contained detailed explanations of the difference between the two subjects of state responsibility properly so called and the legal status of aliens. The clear distinction between the two had never been questioned in a public or private codification, and he was therefore surprised that the matter should have been raised by a member of the International Law Commission".[50]

The most amazing aspect about Garcia Amador's statement is his belief that the separation of subjects had never been raised in the codification process at the ILC, once, as already seen, since 1949 the question was on the table.

The 1960 brief debates show that the lack of consensus within the Commission persisted and nothing was being done to revert the situation.

Garcia Amador presented his sixth (and last) report, in 1961.[51]

Under the chairmanship of Grigory Tunkin, the ILC did not debate the topic of state responsibility in 1961. One of the reasons might be that tensions were aggravated by the fact that, in 1960, much criticism was raised in the Sixth Committee of the General Assembly against the approach adopted by the Special Rapporteur. However, the Commission heard Professor Sohn, that made a short statement about the Harvard draft. No floor was given to the members.[52]

Speaking on a meeting devoted to the future work of Commission, Garcia Amador grasped the opportunity and made a powerful statement, taking especially into account the criticisms he, the Secretariat and the Commission itself suffered from delegations of states that, in his words, "had never been concerned with the development and codification of international law." He refuted accusations stated at the Sixth Committee that his collaboration with the Harvard Law School was in the nature of consultation, not collaboration. At the moment he started to speak about the criticisms made by delegations at the Sixth Committee, Tunkin intervened and asked Garcia Amador to "keep within the limits of the subject under

[49] *Ibidem*, p. 281.
[50] *Ibidem*, p. 282.
[51] ILC. International Responsibility. Sixth Report by F.V. García Amador, Special Rapporteur. *Yearbook of the ILC*, v. 2, 1961, p. 1.
[52] ILC. Summary Records of the Thirteenth Session. *Yearbook of the ILC*, v. 1, 1961, p. 196.

consideration [future codification of international law].”[53] Having the word again, Garcia Amador poses a striking question, suggesting that the postponement in the debate about the topic was deliberate: “The Assembly, in resolution 799 (VIII) of 1953 had requested the Commission to undertake the codification as soon as it thought advisable. Two years later, the Commission had elected the Special Rapporteur, who had submitted his first report in 1956, when the Commission's agenda had become appreciably lighter since it had finished the draft on the law of the sea. Since that time there had only been two items on its agenda of which the Assembly had specifically requested codification: diplomatic immunities and State responsibility, except for the revision of the draft on arbitral procedures. During those six years, many delegations had repeatedly stressed the importance of carrying the codification of State responsibility further, as had done recently the United Nations Commission on Permanent Sovereignty over Natural Resources. How was it then that the Commission, which had produced such fruitful work in its first six years, had continually deferred the study and codification of the topic of State responsibility?”[54]

Zourek was one of the only members to reply, stating that Garcia Amador was the one to be blamed, because he failed in considering in his reports the Commission’s debate in 1956. He then supported that the topic should focus first on the “general principles governing the responsibility of States.” Only after that, the ILC should proceed to other fields. He then seems to equate the “general principles” with “the violation of the rules of international law which were essential for the maintenance of international peace and security and which were laid down specifically in articles 1 and 2 of the Charter.” Such position resembles that advocated by Tunkin, but not that one advanced by Ago and Verdross.[55]

The Secretary also intervened to state that, at the outset of the work on the topic, it was agreed that the ILC would “be limited to the question of the responsibility of the State for injuries caused in its territory to aliens.”[56]

The debates in 1961 show a growing deadlock among members. Moreover, Garcia Amador’s position as Special Rapporteur had become delicate.

[53] *Ibidem*, p. 207-208.
[54] *Ibidem*, p. 208.
[55] *Ibidem*, p. 216.
[56] *Ibidem*, p. 218.

In 1962, Garcia Amador was no longer a member of the ILC. That opened a window of opportunity for it to re-start the study on state responsibility afresh.

The debates happened within the agenda item concerning the General Assembly's Resolution 1686 (XVI),[57] which recommended the Commission to continue its work on specific topics, including state responsibility.

Verdross was once again one of the first to intervene. Coherently with his previous positions, he was in favour of studying the topic of "general principles of state responsibility," excluding that of treatment of aliens.[58]

An opposing view was that of the American jurist, Herbert Briggs, recently elected to the ILC, for whom, a specific aspect of the topic should be chosen. He tried to disqualify the approach on "general principles" because of its abstract nature, divorced from state responsibility's "roots in actual international life."[59]

The Uruguayan Jimenez de Aréchaga followed Briggs' conclusions, but for different reasons. He saw in keeping the focus on damages caused to aliens an opportunity to tackle colonialist and imperialist aspects of state responsibility.[60]

Besides Briggs and Jiménez de Aréchaga, Tsuruoka, Cadieux, and Liu were for keeping, for different reasons, the focus on damages caused to aliens.[61]

But a majority started to be shaped around Verdross' proposal. Members such as Yassen, Bartoš, Castrén, Paredes, Rosenne, Waldock, Gros, and, of course, Ago, manifested for excluding the issue of damages caused to aliens and dealing with the general principles.[62]

Tunkin positioned himself also for excluding damages caused to aliens, but in a way explicitly diverse as to Ago: "The Commission would have to take the topic of state responsibility as a whole and examine it in the light of recent developments in international life and international law." And he added: "[t]he aspects of state responsibility cited by Mr. Ago did exist, but those were traditional aspects." New developments, for him, were related to "responsibility for acts which endangered the peace or constituted a breach of the peace, and

[57] UNITED NATIONS. GENERAL ASSEMBLY. *Future Work in the Field of the Codification and Progressive Development of International Law*, A/RES/1686(XVI), 18 December 1961.
[58] ILC. Summary Records of the Fourteenth Session. *Yearbook of the ILC*, v. 1, 1962, p. 3.
[59] *Ibidem*, p. 9, 27.
[60] *Ibidem*, p. 26.
[61] *Ibidem*, p. 30-31, 39.
[62] *Ibidem*, p. 10-11, 13, 15, 17, 25, 37, 39

responsibility for acts impeding the struggle of colonial peoples for independence."[63] However, he made explicit that what he meant was not being limited to "general principles" since "the Commission should go much further."

Such position by Tunkin, which apparently was followed by Tabibi,[64] if adopted by the ILC, could lead to the same critique as to the supporters of the focus on damages caused to aliens, because it would leave a lack – of all other aspects not directly related to the maintenance of peace and colonialism.

At the end of the debates, the Commission decided to establish a sub-committee on state responsibility "to define the scope of the topic of state responsibility and that no directives had been given to it by the Commission itself." It was composed by Ago (Chairman), Briggs, Gros, Jiménez de Aréchaga, Lachs, de Luna, Paredes, Tsuruoka, Tunkin, and Yassen.[65]

In the same year of 1962, the sub-committee gathered and decided to "be devoted primarily [but not exclusively] to the general aspects of State responsibility" – without a specification of the meaning of such generality - and that members would prepare memoranda to inform the debates. It was also decided that it would meet in January 1963.

And so it did. The sub-committee received memoranda from Jiménez de Aréchaga, Paredes, Gros, Tsuruoka, Yassen and Ago. After just four meetings, it reached a unanimous decision to "give priority to the definition of the general rules governing the international responsibility of the State," without limiting itself to the issue of responsibility for damages caused to aliens.[66] The sub-committee also approved an outline program of work, based on Ago's paper proposals.[67]

In its 1963 session, the Commission took note of the Report of the President of the sub-committee and no clear opposition was raised by any member to its conclusions; on the contrary, many compliments were given to the sub-committee and its Chairman. The subcommittee's report was adopted in full and, by acclamation, Roberto Ago was appointed as Special Rapporteur for state responsibility.[68] The "Ago Revolution" was about to start.

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[63] *Ibidem*, p. 16.
[64] *Ibidem*, p. 24.
[65] *Ibidem*, p. 45, 283.
[66] ILC. Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility. *Yearbook of the ILC*, v. 2, 1963, p. 227 (containing the discussions within the sub-committee – Appendix I - as well as the memoranda submitted by Jiménez de Aréchaga, Paredes, Gros, Tsuruoka, Yassen and Ago – Appendix II).
[67] ILC. State Responsibility: Report of the Sub-Committee. *Yearbook of the ILC*, v. 2, 1963, p. 223-224.
[68] ILC. Summary Records of the Fifteenth Session. *Yearbook of the ILC*, v. 1, 1963, p. 79-86.

However, before going into the role that the distinction between primary and secondary rules played in the so-called "Ago Revolution," it is important to make two general remarks about the Garcia Amador's years.

In the 1962 debates, Manfred Lachs, while commenting on the ILC future methods of work on state responsibility made a sharp criticism against the Commission that seems to explain, succinctly and intelligently, what happened between 1956 and 1961. For him, "[o]ne mistake had been to leave the special rapporteur without any guidance from the Commission, with the consequence that the report submitted reflected only the special rapporteur's personal opinions." The criticism was soon dismissed by the Chairman, claiming the "pressure of other work."[69] But the fact remains that, already in 1961, Garcia Amador had shown that the reports could have been fully appreciated.

The historiography on the law of state responsibility has accepted without second thoughts that the failure of the codification project during the Garcia Amador's years is mainly due to an "unsuitable approach"[70] taken by the then special rapporteur towards the codification of international law. The Cuban jurist was even accused of causing a deadlock in the codification project because of his "strategic clumsiness."[71] The picture is much more complex than those narratives. They seem to be teleologically framed to idealise the work of Ago and the framework in which the ILC's articles on state responsibility, finally approved in 2011, are based upon.[72]

If Garcia Amador failed as a special rapporteur, so did the Commission itself.

It is a fact that Garcia Amador insisted in many (but not in all) aspects of his conception about the codification of the law of state responsibility as envisaged in his first report and even in the memorandum he addressed to the ILC in 1954. However, apart from certain aspects – such as that on wrongful acts that should be punished – the Commission as a whole provided

[69] *Ibidem*, p., 23.
[70] MÜLLER, Daniel. The Work of García Amador on State Responsibility for Injury Caused to Aliens, *Op. Cit.*, p. 73.
[71] PELLET, Alain. The ILC's Articles on State Responsibility for International Wrongful Acts and Related Texts, *Op. Cit.*, p. 78. Even narratives that are more sophisticated and critical than that of Pellet tend to picture Garcia-Amador as an unexperienced member – something difficult to be proven based solely upon the ILC's records. That is the case of Nissel, for whom: "García-Amador clearly had no experience with, nor any understanding of committee politics – where decisions are often made prior to, rather than during meetings." NISSEL, Alan. The Duality of State Responsibility, *Op. Cit.*, p. 824.
[72] Such narrative was fueled by Ago himself, as shown by his contradictory positions about Garcia Amador following of the ILC's mandate in 1957 and 1969. See note 26.

no specific guidance for his future work. Much criticism was raised against his ideas, but some members supported him in many respects. In every single year he acted as Special Rapporteur, Garcia Amador presented reports that were cursory or even not considered by the Commission. If that was a deliberate strategy by some members to isolate the special rapporteur – as seems to suggest Matine-Daftary's intervention in 1959 – the Commission had the duty at least to appoint a new Special Rapporteur.

Someone could argue that Garcia Amador was not sufficiently politically acute in realizing he was increasingly being isolated within the ILC. Perhaps this is true, but only partially. There were so many paths to be taken (four at least, taking the general and often confusing statements by ILC members during the years) that choosing one could be risky if he did not have a precise mandate from the Commission as a whole.

Thus, the ILC is also responsible for the failure in the codification project on state responsibility from 1955 to 1961.

Another general remark is related to the role played by the ideological confrontations in the failure of the Garcia Amador's approach.

It is undeniable that, even in 1956, the ideological confrontation was a big issue in the ILC's debates. However, if we consider the evolution of the debates within the Commission, we conclude that ideological arguments were quite independent of "technical" ones. Sometimes, they were opposed to each other.

Ago's intervention, in the beginning of the 1957 debates, was of a "technical nature." He was trying to offer a different path to codification by separating law form politics. In other words, in the first moment, Ago was not attempting to bring to his side members from socialist and Third World countries; he was, in fact, opposing them. Perhaps he realised, after some years, that he could use such "politicization" in his favour. In any case, Ago's position, distancing from the Garcia Amador's approach, was not a direct result of the ideological confrontation.[73]

Hence, it is plausible to say that Ago played an active role, since at least 1957, in tackling the Garcia Amador's approach. He was the first to contest, in a clear and very intelligible fashion,

[73] That is why it does not seem historically accurate to affirm that "[d]istancing from this debate was Ago's first stroke of genius," as stated by Pellet because Ago was already distant from it when the ideological debate emerged within the ILC. PELLET, Alain. The ILC's Articles on State Responsibility for International Wrongful Acts and Related Texts, *Op. Cit.*, p. 76

that approach, and was the first to oppose technical to political arguments about state responsibility. We cannot also underestimate the role of Verdross and Tunkin. The first also adopted the "technical" tone and supported Ago's points more than once. The second pressured to the politicization of the topic by supporting the need for its renewal taking into regard the emergence of socialism and the end of colonial empires.

2 THE PRIMARY/SECONDARY RULES DISTINCTION AND THE "AGO REVOLUTION"

"Ago Revolution" is a term coined by Alain Pellet to describe Roberto Ago's input in the ILC codification works on the topic of state responsibility, distancing from Garcia Amador's approach.[74]

For one to understand how such "revolution" took place, it is essential to go back to the debates in the Sub-Committee, in 1963, which were the main battlefront against the so-called "restricted view" of Garcia Amador.

2.1 THE DEBATES WITHIN THE ILC'S SUB-COMMITTEE ON STATE RESPONSIBILITY

As already noted, the discussions of the Sub-Committee were informed by papers previously presented by some of its members.

Ago's report is, by far, the one that most influenced the discussions of 1963. It is not the most extensive one, but it follows a clear strategy that put his eventual opponents in the awkward situation of having to revolve the whole history of the law of state responsibility to make plausible contestations.

Ago admits that the bibliography, as well as the cases in international practice, are abundant on the topic of state responsibility regarding damages caused to aliens. However, such materials were based upon a critical lack, since it "is concerned chiefly with particular points and aspects"[75] The topic of state responsibility was, thus, seen as one that did not adequately

[74] PELLET, Alain. The ILC's Articles on State Responsibility for International Wrongful Acts and Related Texts, *Op. Cit.*, p. 76.
[75] See ILC. Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility, *Op. Cit.*, p. 252.

assigned "to each element its true place in a systematic whole."[76] The dichotomy between parts and the whole (general and particular) plays an essential role in Ago's argumentation.

He then describes several codification projects of rules of state responsibility and finds a common denominator among them, one that made all fail: the "particular approach." Ago does not inquire into the political reasons for the Harvard, the League of Nations or Garcia Amador's projects to fail.

This way, he applies the inadequacy of the option for the "particular approach" empirically to previous state responsibility codification projects. Things put this way, the "whole approach" remained as the one to be tested by the ILC.

However, "the whole" is a relational concept. Its existence depends on its contrary, "the part." If not removed to another semantic field, "the whole" can easily become "the part." If seen as a set of organised rules, state responsibility is just a part of the whole of the international legal rules. A possible transformation of the whole into a part becomes possible when Ago states that "[m]y point is merely that any discussion of international responsibility should take into account the whole of responsibility and nothing but responsibility."[77] The restriction "but responsibility" cannot be easily reconciled with "the whole of responsibility."

That is why, to avoid an aporia, Ago needs to add to the equation another dichotomy, which is not quantitative, but qualitative: that of form and substance. In the codification efforts, state responsibility rules must be dealt not only as a whole but as rules that differ, by their nature, from others that are substantive. He, thus, pontificates: "Once again, what I wish to emphasise is merely that the consideration of the contents of the various rules of substance should not be an object in itself in the study of responsibility, and that the contents of these rules should be taken into account only to illustrate the consequences which may arise from an infringement of the rules".[78]

He does not call state responsibility rules as formal or procedural in nature; he just nominates their counterparts: "rules of substance."

[76] *Ibidem*, p. 252.
[77] *Ibidem*, p. 253.
[78] *Ibidem*, p. 253.

Other reports – those of Mustafa Yasseen and André Gros - adopted a similar attitude as Ago's concerning supporting a widening of the scope of ILC on the topic, without, however, the argumentative sophistication of the Italian jurist.[79]

There were, however, those that followed the opposite path. Senjin Tsuruoka proposed the ILC to, first, undertake the study of responsibility for damages caused to aliens and, then, proceed to general issues. Also, Eduardo Jiménez de Aréchaga produced a long paper entitled "The duty to compensate for the nationalization of foreign property," possibly under the premise that the ILC would proceed with its focus on damages caused to aliens.[80]

Such opposite views in those papers show that, until, at least, that moment, no uniform position was to be found within the ILC.

The discussions also reveal that, initially, the sub-committee was still divided. Briggs joined Tsuruoka and Jiménez de Aréchaga (who had both previously presented papers) in supporting a codification project focused on damages caused to aliens. There were also mid-term positions, such as Andre Gros', who, at a certain stage, called for a codification in two steps: the first devoted to "general aspects of state responsibility," and a second dealing with "responsibility of the State in particular circumstances," something that is not clear in the paper he had previously presented. In his first intervention, Tunkin adopted a similar attitude to that he professed in many previous sessions of the Plenary of the ILC on the topic. While advocating that the Commission should focus on the "general principles of State responsibility," its work should "consider the most important new subject [of international law] — that of the responsibility of States for acts of aggression" besides problems emerging from de decolonization process and the sovereignty of states over their natural resources. Briggs soon intervened to state that, by following that path, the distinction between form and substance proposed by other members would make no sense, because those issues would be "questions of substance".[81]

The historiography of state responsibility does not do proper justice to the role played by Eduardo Jiménez de Aréchaga in overcoming the deadlock in the works on the topic. Soon after Tunkin and Briggs (not by coincidence, the ILC members from the USSR and the USA) presented their positions, Jiménez de Aréchaga stated in a crystal-clear fashion: "that the

[79] *Ibidem*, p. 246.
[80] *Ibidem*, p. 237-244, 248.
[81] *Ibidem*, p. 230, 233-234.

majority of the members of the Sub-Committee favoured the priority suggested by the Chairman in his paper. Mr. Briggs, Mr. Tsuruoka and he (the speaker) were thus in the minority, and he thought it would not serve any useful purpose to continue the discussion on method. He would co-operate in the work of the Sub-Committee in accordance with the method which the majority preferred".[82]

That was the last time, during the Sub-committee meetings, that questions relating to the possible focus of the ILC codification work on state responsibility for damages caused to aliens emerged. The surrender of the position advocated by the three members – although only stated by Jiménez de Aréchaga - was suddenly realised by Ago, who, without any delay, closed the discussions on the issue.[83] As the immediate next speaker after Jiménez de Aréchaga, Ago first tackled the dimension of particularity in favour of generality, stating that: "the Sub-Committee agreed that the work on State responsibility should be devoted to the general problems of the international responsibility of States." He then buried the dimension of substance, by saying that "no attempt would be made to discuss and define certain principles of substantive international law, whether those principles related to old-established or to new areas of the law".[84]

That was also the moment when the so-called "Garcia Amador's approach" was definitely expurgated from the whole of the ILC works on state responsibility. As already stated in the previous section, the sub-committee unanimously decided that the topic of state responsibility would not deal with to substantive rules; such decision was approved by the Plenary of the ILC.

2.2 THE COMING OF THE TERMINOLOGY PRIMARY/SECONDARY RULES

Apart from a brief note presented in 1967,[85] Ago just presented a lengthy study as Special Rapporteur in 1969, the date of his first report.[86]

[82] *Ibidem*, p. 234.
[83] Such move shows clearly that Ago was essentially a skillful politician. That is why Nissel is correct when, analyzing the so-called "Ago's revolution", states that: "The success of Ago's approach did not lie in doctrine alone, but in committee politics as well". NISSEL, Alan. The Duality of State Responsibility, *Op. Cit.*, p. 837.
[84] ILC. Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility, Op. Cit., p. 234.
[85] ILC. Note on State Responsibility, by Roberto Ago, Special Rapporteur. *Yearbook of the ILC*, v. 2, 1967, p. 325.
[86] ILC. First Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur. *Yearbook of the ILC*, v. 2, 1969, p. 125.

The piece is wholly devoted to tracing a history of different projects for the codification of the law of state responsibility (although almost half of it is composed of annexes compiling texts that resulted from that codification efforts). The narrative made by Ago in this report brings to the table arguments that are still regularly used today by different scholars to establish the *avant-garde* character of the Italian jurist's imprint in the codification works.

The strategy is clearly teleological: to prove that the reason for the failure of the previous codification efforts was that they did not isolate the topic of state responsibility from others. Such non-separation was due to two different causes: one related to progress and development in legal theory and, the other, for practical reasons for making a codification project to advance.

First, by recurring to the idea of "development of international legal theory" and "progress" in the study of the fields of international responsibility and that of the status of aliens, Ago stated that, at his time, their treatment should be made separately.[87] He thus brought progress to his side. The consequence would be that any entangled treatment of the topic would sound as secular, non-evolved or unscientific. Ago was justifying a fracture in time, a discontinuity, a new beginning.

In parallel, he did not get rid of the practical implications of the codification work: the non-separation of state responsibility from other topics was one of the remaining reasons for the past projects to fail. In fact, he puts more emphasis on such practical implications than the first cause, related to "developments of international legal theory." He thus uses stronger words to make his points: "unquestionably," "undoubtedly," "firmly believes," the "most valuable lesson": "At some stage, however, it unquestionably became essential to isolate the subject of responsibility *stricto sensu*, together with the relevant principles, and to divorce it from any other body of substantive rules of international law. The continued confusion of State responsibility with other topics was undoubtedly one of the reasons which prevented it from becoming ripe for codification. The Special Rapporteur firmly believes that, for purposes of codification, the international responsibility of the State must be considered as such, i.e., as the situation resulting from a State's non-fulfilment of an international legal obligation, regardless of the nature of that obligation and the matter to which it relates. This conclusion even seems to the Special Rapporteur to be the most valuable lesson to be drawn from a retrospective

[87] *Ibidem*, p. 127.

examination of the successive efforts to codify this important and delicate sector of international law".[88]

Such mixture of a sense of scientific progress with practical interest in making the codification project to advance is primarily at the ground of Ago's reading of the contribution of Garcia Amador to the codification works on state responsibility, which composes six pages of the sixteen pages of the report.

One year later, in 1970, by occasion of the presentation of his second report, Ago returned to the issue of the adequate methodology to be deployed by the ILC in its work on the topic. He then restated the difference between rules that define obligations and rules that deal with the violation of the previous ones and their consequences.[89] Once more, he made use of a strategy that linked the success of the codification project to the adoption of a particular methodology.

Within such framework, the use of the terminology "secondary rules" to describe the rules on state responsibility came as a consequence of conceiving them as rules that "determine whether that obligation has been violated and what should be the consequences of the violation." The semantics of what constitutes a "secondary rule" was already crystal-clear, and the terminology deployed was more a matter of words. That is why the well-known paragraph of the 1970 Second Report, in which Ago introduces, for the first time, the word "secondary" to describe the rules on state responsibility, was the culmination of a process: "In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one sector of inter-State relations or another, impose particular obligations on States, and which may, in a certain sense, be termed "primary", as opposed to the other rules—precisely those covering the field of responsibility—which may be termed "secondary", inasmuch as they are concerned with determining the consequences of failure to fulfil obligations established by the primary rules".[90]

From 1973 on, several members, including Ago himself, started to use the terminology in a generalised fashion. In the same year, the ILC Yearbook, while presenting the topic of state

[88] *Ibidem*, p. 127.
[89] *Ibidem*, p. 178.
[90] ILC. Second Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur. *Yearbook of the ILC*, v. 2, 1970, p. 179.

responsibility, for the first time stated that the Commission's work on that regard was restricted to "secondary rules."[91]

It is not this article's aim to trace the origin of the terminology itself. One thing, however, can be said, on this respect: there is nothing in Ago's *oeuvre* that suggests that he took the terminology from H.L.A. Hart's *The Concept of Law*. More plausible would be to say that he took it from Alf Ross.[92]

In 1947 – more than ten years before Hart's masterwork – Ross stated in his *A Textbook of International Law*: "[…] a legal system - in contrast with moral rules – cannot stop at the mere act of prescribing a certain conduct as duty. In case the central primary norms of intercourse are contravened, it is not enough to note this and perhaps disapprove of it, but, according to certain rules, there arises a definite responsibility for the contravener of the duty. The primary rules must therefore be supplemented by secondary rules relating to breaches of law and responsibility."[93]

With small adaptations, such statement could be attributed to Roberto Ago himself.

Furthermore, it is out of question that Ago was acquainted with Ross' book, since he makes many explicit references to it in the Second Report[94] – where, as mentioned earlier, he deployed for the first time the term "secondary rules".

CONCLUSIONS

The distinction between primary and secondary rules in the domain of state responsibility was the direct result of the critique made to Garcia Amador's approach, that dealt with the topic from the perspective of damages caused to foreigners. Ago played a crucial role in applying the distinction to the codification work of the ILC relating to the topic, although it

[91] ILC. Report of the International Law Commission on the work of its twenty-fifth session, State Responsibility. *Yearbook of the ILC*, v. 2, 1973, p. 169. In volume 1 of the same Yearbook, that summarises the discussions among members, references to the terminology as applied to state responsibility can be found. ILC. Summary Records of the Twenty-Fifth Session. *Yearbook of the ILC*, v. 1, 1973, p. 5-125.

[92] See SPIERMANN, Ole. A National Lawyer Takes Stock: Professor Ross' Textbook and Other Forays into International Law. *European Journal of International Law*, v. 14, n. 4, 2003, p. 697. See also GOURGOURINIS, Anastasios. General/Particular International Law and Primary/Secondary Rules, Op. Cit., p. 1016-1018. The author is correct in seeing no clear link between Hart and Ago on what relates the distinction primary and secondary rules; however, he does not properly realizes the influence of Ross' thinking on Ago's ideas on the issue.

[93] ROSS, Alf. *A Textbook of International Law*. London: Longmans, 1947, p. 77.

[94] ILC. Second Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur. *Yearbook of the ILC*, v. 2, 1970, p. 186, 188, 190, 194.

would be too reductionist to underestimate the contribution of other members of the Commission.

It is relevant to note that, despite the fact that, in many ways, the need for the distinction was grounded on the separation between political and legal considerations, it would not become a reality without the politicization of the discussion within the Commission, mainly due to the arguments brought by members from socialist and Third World countries. Their support for the Ago's approach was due more because it offered an exit from the Garcia Amador's approach than because it operated a separation of law from politics.

Indeed, it seems that the Commission's continuous postponement of any in-depth discussion over Garcia Amador's reports and the efforts made to isolate the then Special Rapporteur show that an alternative approach to emerge at that time would be the result of a robust political compromise.

Hence, it seems clear that Ago's appeal, in 1957, to approach state responsibility apart from political considerations was grounded on an aporia, since there is hardly a method that is not embedded on a political conception over the role of law in relation to politics. A strict legal approach to state responsibility made the Commission not to touch upon the causes of the influence of colonialism or even capitalism over the topic of state responsibility. Also, by splitting form from substance in the topic, the Commission reinforced a view that state responsibility has nothing or almost nothing to do with issues politically relevant such as justice, fairness, and equality among states.

If both Garcia Amador and Ago approached the topic politically, despite the efforts of the latter to deny it,[95] their narratives about the history of the codification of the topic lead to similar results.

Garcia Amador adopted a perspective of continuity regarding the history of codification. He envisaged the role of the Commission as one to insist in codifying rules of state responsibility regarding damages caused to foreigners. For Ago, such insistence was the very cause of the codification efforts of the past to fail. In his view, a break, an evolution was necessary to make the codification project to advance: that was by expurgating substantive rules from codification.

[95] See also NISSEL, Alan. The Duality of State Responsibility, *Op. Cit.*, p. 835.

Such narratives lead to similar results because both looked for the past to find an authority to their projects about the codification of state responsibility rules. In the case of Garcia Amador, former projects were the path in which the ILC should rely on and, consequently, find their authority. For Ago, the failure of past projects was the very cause to make the ILC to choose for a different path – in this case, the authority of the work of the ILC would rely on the overcoming of the past, being the past a negative force to drive the future.

This narrative of the road that made the ILC to adopt the distinction between primary and secondary rules in the law of state responsibility aimed to show that other possibilities were at the table at that time. Having such consciousness is the first step to avoid the future being a recurrent repetition of the past or a projection of an unrealised present. This is something that deserves international lawyers' deep attention.

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