

# 1. Concept and history

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## 1. RESPONSIBILITY AND LAW

Responsibility is a cardinal concept of law; more precisely, it is inseparable from the modern conceptions of a legal order and legal norms. The term flows from the idea of ‘responding’. The response at issue here is the one a subject owes to other subjects when it has breached a legal obligation incumbent upon it. In other words, responsibility means responding to the breach of legal obligations. The term ‘responding’ connotes the idea that there are legal consequences flowing from such breach. In turn, the concept of responsibility thus reflects the binding nature of the legal obligation and in a broader sense the ‘sanctionability’ of the law in general. If the legal rule could be infringed without legal consequences, this would be tantamount to saying that the law does not contain binding prescriptions.<sup>1</sup> But such a position is at odds with our elementary conception of what the law is. Responsibility consequently indicates the minimum level at which the law will be regarded as being ‘effective’, i.e. binding and by that fact legal rather than moral. The point is here one of a normative binding nature; the additional fact that there are centralized institutions for sanctioning the breach is not inherent in the concept of law but depends on the type of society, whether centralized or decentralized in nature. Responsibility thus reflects (and tries to ensure) the binding nature of the law, not a particular form of organization of its sanction.

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<sup>1</sup> See A. Pellet, ‘The Definition of Responsibility in International Law’, in: Crawford, Pellet and Olleson, p. 4: ‘no responsibility, no law’. See L. Oppenheim, *International Law*, vol. I, 3rd ed., London, 1920, p. 195; J. P. A. François, ‘Règles générales du droit de la paix’, *RCADI*, vol. 66, 1938-IV, p. 275; ‘The Fundamental Principles of International Law’, *RCADI*, vol. 87, 1955-I, p. 357; H. Mosler, ‘The International Society as a Legal Community’, *RCADI*, vol. 140, 1974-IV, p. 172. And see later R. Ago, Third Report, § 31. In the case law, see the *British Claims in the Spanish Zone of Morocco* case (1925), *RIAA*, vol. II, p. 641, where responsibility is designated as the necessary corollary of the law. In the *Barcelona Traction* case, ICJ, *Reports*, 1970, p. 33, § 36, the ICJ emphasized that ‘[r]esponsibility is the necessary corollary of a right’.

It therefore stands to reason that responsibility fulfils an important systemic function. When a certain prescription gives rise to the consequences of responsibility, this prescription will be called legal; conversely, if it does not produce such consequences, the prescription will remain outside the bounds of strict law, in the confines of soft law, or political or moral obligations. Its breach may well then provoke an array of other consequences, such as political reprimand, but it will not give rise to legal responsibility. The concept of responsibility thus to some extent allows obligations to be classified and law to be separated from non-law. It will also be appreciated that the legal order is rightly called a 'system' in that it seeks to guarantee a degree of completeness allowing it to function properly. The law, in its modern conception, is not a haphazard collection of self-contained rules percolating somewhere in a fluid landscape. The various branches of the law form a finely tuned system which is designed to ensure a proper working of the law so as to further its main aims: social order and justice. To this effect, the law is highly anticipatory: it contemplates in advance its own breach and provides legal consequences for it. In a sense, it is thus realistic, or even perhaps masochistic, if one considers the importance it attaches to responsibility issues. This quintessential link of the law with responsibility has been well expressed by the Permanent Court of International Justice (PCIJ) in a celebrated passage of the *Chrozów Factory* case of 1928: '[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation'.<sup>2</sup> The Court here manifestly meant legal engagements. And in this narrower compass, it was clearly right.

## 2. LEGAL NATURE OF RESPONSIBILITY

From the aforesaid it follows that the domain of responsibility is completely integrated into the legal order: it is a *legal* response to the breach of law. The unlawful act (breach of obligation), which lies at its root, is not simply an *anti- or extra-legal* fact, thus lying outside the province of law and contemplated by some legal norms to attach consequences to it. The unlawful conduct is a 'legal fact', i.e. a fact contemplated by a legal norm to which it attaches legal consequences.<sup>3</sup>

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<sup>2</sup> PCIJ, ser. A, no. 17, p. 29.

<sup>3</sup> Ago, 'Délit', pp. 422ff. Conversely, the unlawful conduct is not a 'legal act', since the consequences flowing from the conduct are not ones that the subject breaching the obligation intended to create. On the internationally

This was meant by the lofty formula of the ‘masochism’ of law used above: the law integrates into itself its breach; the anti-legal fact is thereby turned into a legal one. This is a distinctive feature of responsibility; like a philosopher’s stone, it transforms the nature of the fact contemplated by integrating it into the legal order – even if the said fact is at its root a negation of lawfulness and law. The legal consequences flowing from the breach are manifold; the main ones create a duty to make reparation and allow for taking countermeasures (CM) (reprisals or sanctions).

The duty to make reparation creates a new legal obligation incumbent on the wrongdoer and a new subjective right vested in the subject whose rights have been infringed. This new obligation and right are added to the obligations and rights that have been the object of breach. There is thus a ‘secondary level’ or secondary round of obligations and rights created, additional to the ‘primary level’ of pre-existing obligations (a notion we will come back to). Conversely, the power to take CM does not create new rights and obligations on the secondary level. The aggrieved subject may take such measures here. But this is a mere power. In other words, if the subject against whom the sanctioning measures are taken finds ways to successfully ward them off, it does not thereby commit an unlawful act. Put more simply, there is no legal duty to suffer CM without reacting. The duty to make reparation is a *via juris*, i.e. the breach of legal obligations generates new legal obligations; the CM (or historically reprisals) is a *via facti*, i.e. the power to adopt factual measures otherwise prohibited. But both reactions are regulated and allowed by the law.

That the law of responsibility is entirely rooted in the law and takes a normative approach to unlawful acts will also be seen in specific subject areas, such as those on the ‘attribution’ of conduct to a subject. We will see there that for attributing conduct to a subject the relevant norms of international law refer frequently to facts, e.g. to the ‘effective organization of the State’ in its municipal setting. Nonetheless, this ‘effective State organization’ is not a free-standing fact which imposes itself from the outside onto the law of State responsibility. Rather, it is contemplated by the norms of international law itself as relevant ‘legal facts’ to which the legal consequence of attribution is attached.<sup>4</sup> All aspects of the law of responsibility are thus parts of international law and provided for by international norms, mainly of customary nature. The point that the

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wrongful act as a legal fact, see also G. Morelli (translation by R. Kolb), *Notions de droit international public*, Paris, 2013, p. 256.

<sup>4</sup> L. Condorelli and C. Kress, ‘The Rules of Attribution’, in: Crawford, Pellet and Olleson, pp. 225–226.

‘unlawful act’ is intrinsically illegal does not change this state of affairs. Illegality is also (albeit not exclusively) a legal concept.

### 3. RELATIONSHIP BETWEEN REPARATION AND COUNTERMEASURES

For some authors,<sup>5</sup> the consequences which flow from the breach of an obligation under the heading of responsibility are limited to the duty to restitute and to make reparation. The breach of an obligation thus gives rise to a new obligation. Countermeasures as unilateral measures of constraint are a separate issue of international law and not part of the law of responsibility. For the mainstream,<sup>6</sup> the breach of an obligation gives

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<sup>5</sup> See e.g. P. Reuter, *YbILC*, 1983-I, 1772nd Meeting, §§ 13–16, with the distinction between responsibility/reparation and coercion/CM. This is also the reason why the French delegate argued at the 6th Committee of the UNGA that the law of reprisals should not be codified in the context of State responsibility: A/C.6/39/SR.38, § 40. Further: H. Thierry, ‘L’évolution du droit international, Cours général de droit international public’, *RCADI*, vol. 222, 1990-III, pp. 108–109, arguing in favour of a distinction between both types of consequences. See also the separate treatment of CM in older and newer treatises and courses on international law, as part of the measures of self-help or constraint: see e.g. M. Bourquin, ‘Règles générales du droit de la paix’, *RCADI*, vol. 35, 1931-I, pp. 202ff, 221ff; J. P. A François, ‘Règles générales du droit de la paix’, *RCADI*, vol. 66, 1938-IV, pp. 251ff, 275ff; J. A. Pastor Ridruejo, ‘Le droit international à la veille du vingt et unième siècle’, *RCADI*, vol. 274, 1998, pp. 81ff, 84ff; A. Mahiou, ‘Le droit international ou la dialectique de la rigueur et de la flexibilité’, *RCADI*, vol. 337, 2008, pp. 435ff, 459ff. Very often, the ‘consequences of responsibility’ are treated as encompassing only the duty to make reparation (and possibly diplomatic protection): see e.g. H. Accioly, ‘Principes généraux de la responsabilité internationale d’après la doctrine et la jurisprudence’, *RCADI*, vol. 96, 1959-I, pp. 413ff; M. N. Shaw, *International Law*, 6th ed., Cambridge, 2008, pp. 800ff. Sometimes CM are admitted only as a device to implement the duty of reparation if there is no spontaneous compliance: cf. the discussion in M. Iovane, *La riparazione nella teoria e nella prassi dell’illecito internazionale*, Milan, 1990, p. 22. There are also some authors who claim that international responsibility is a larger concept than civil responsibility under municipal law, one reason being that it includes CM: cf. C. Dominicé, ‘La société internationale à la recherché de son équilibre’, *RCADI*, vol. 370, 2013, pp. 220–221, 222. And finally some authors treat the duty to make reparation and the CM as two sets of consequences of the internationally wrongful act (IWA), as did the ILC: see e.g. G. Morelli (translation by R. Kolb), *Notions de droit international public*, Paris, 2013, pp. 266ff.

<sup>6</sup> Crawford, *State*, pp. 684ff.

rise primarily to the duty to restitute and/or make reparation. Only if the responsible State refuses to honour this 'secondary' obligation of restitution and/or reparation can the aggrieved State take unilateral CM (historically called reprisals) so as to induce the former State to resume a proper fulfilment of its duties. In other words, the main consequence is the one coagulating around the notion of reparation (which forms a new obligation); CM are only a device of last resort in the situations where reparation is refused. The reason for this subsidiary nature of CM lies in the fact that unilateral measures of coercion without prior judicial determination of the mutual entitlements is an anarchic and highly unsatisfactory means of law enforcement. It disturbs social order and is prone to abuse by powerful States.

There is, however, one famous minority view which inverts the scales. For H. Kelsen,<sup>7</sup> the sole consequence arising from the breach of a legal obligation under general international law is the fact that the aggrieved State can mete out reprisals or, under classical international law, proceed to war. Thus, international responsibility has an essentially collective character. The sanction for a certain conduct is placed at the centre of the system of law and of responsibility in particular.<sup>8</sup> The duty to make reparation, for its part, appears only under particular international law, i.e. through agreements which States may conclude. More precisely, the wrongdoing State can avoid the consequences of the sanction (mainly the decentralized 'sanction' of CM) by concluding an agreement with the aggrieved State whereby the tort is liquidated according to a certain agreed regime. The restitution or reparation will then occur in that conventional context. Thus, as can be seen, while for the mainstream the unilateral CM are subsidiary to the duty to make reparation (but both are

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<sup>7</sup> H. Kelsen, 'Unrecht und Unrechtsfolge im Völkerrecht', *Zeitschrift für öffentliches Recht*, vol. 12, 1932, pp. 481ff; H. Kelsen, 'Théorie du droit international public', *RCADI*, vol. 84, 1953-III, pp. 30–31, 33. The followers of Kelsen have often downplayed the position of their mentor. Thus, P. Guggenheim, 'Les principes de droit international public' *RCADI*, vol. 80, 1952-I, pp. 142ff, considers that the aggrieved State has first to seek to obtain reparation before adopting CM. However, Kelsen has also had other followers: cf. for example B. Conforti, 'Cours général de droit international public', *RCADI*, vol. 212, 1988-V, pp. 181ff. It has also been stated that the rules of the law of responsibility owe their origin to the limitation of reprisals by way of agreements: G. Schwarzenberger, 'The Fundamental Principles of International Law', *RCADI*, vol. 87, 1955-I, p. 349.

<sup>8</sup> H. Kelsen, 'Théorie du droit international public', *RCADI*, vol. 42, 1932-IV, pp. 124ff. See also H. Kelsen (R. W. Tucker (ed)), *Principles of International Law*, New York, 1966, p. 22.

placed within the realm of general international law), for Kelsen's school of thought the duty to make reparation is subsidiary to reprisals (the former is placed in an agreement derogating from general international law). The mainstream view is more in tune with modern international law, with its quest for avoidance and limitation of unilateral measures. But Kelsen's view has much appeal to explain the old state of the law, as it prevailed until the League of Nations. The League would then stand for the progressive repelling of unilateral forcible measures 'short of war' and thus for the development of modern international law.<sup>9</sup>

#### 4. PRIMARY AND SECONDARY OBLIGATIONS

For a long time the law of international responsibility was not systematized – it was hardly even developed on the international stage. Rather, issues relating to consequences for breach of the law arose in a myriad of different contexts, which gave rise to analysis within the four corners of the rules applicable in these areas. In a sense, the law was discussed in the boxes of many *leges speciales*, mainly in the following contexts:<sup>10</sup> offences against ambassadors and envoys; infringements of the rights of aliens and letters of reprisals; breaches of the law through privateers and concessioner troops; and the violation of the rights of neutrals in maritime warfare. The issues of responsibility were thus intermingled with issues of the applicable rights and obligations in these various areas of international law. It is mainly through the effort of the Italian school of international law, with its conceptual toolbox, that a 'general part' on State responsibility progressively saw the light of day: authors like Anzilotti<sup>11</sup> and Cavaglieri<sup>12</sup> were ground-breaking; the German school was also among the pioneers.<sup>13</sup> Conversely, the attempts at codification of the law of State responsibility at the Hague Conference of 1930<sup>14</sup> and

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<sup>9</sup> R. Kolb, 'De la SDN à l'ONU en matière de maintien de la paix', in: R. Kolb (ed), *Commentaries sur le Pacte de la Société des Nations*, Brussels, 2015, p. 1356, with further references; N. Politis, 'Les représailles entre Etats membres de la Société des Nations', *RGDIP*, vol. 31, 1924, pp. 5ff.

<sup>10</sup> Anzilotti, *Teoria*, pp. 1ff; Schoen, *Völkerrechtliche*, pp. 1ff.

<sup>11</sup> *Teoria*, pp. 1ff.

<sup>12</sup> A. Cavaglieri, 'Règles générales du droit de la paix', *RCADI*, vol. 26, 1929-I, pp. 539ff.

<sup>13</sup> See in particular Schoen, *Völkerrechtliche*; Strupp, *Völkerrechtliche Delikt*.

<sup>14</sup> C. Bories, 'The Hague Conference 1930', in: Crawford, Pellet and Olleson, pp. 61ff.

later by the ILC under García-Amador<sup>15</sup> were stymied by the fact that this codification seemed to imply at the same time a codification of the various rules applicable in the subjects under discussion, in particular the rules for the protection of aliens. It turned out that these rules were controversial, so that the codification of responsibility proved impossible.<sup>16</sup> If the rules on responsibility could not be detached from the various substantive rules of international law so as to form a body of law in itself, the effort at codification of this specific area of the law would have to be abandoned. In the wake of this effort to find the proper configuration of the law of international responsibility, the distinction between 'primary' and 'secondary' rules was promoted. Primary rules are all the substantive and procedural rules of international law whose breach gives rise to responsibility. Secondary rules encompass all the new obligations or faculties which flow as consequences from the unlawful act. Thus, the rule on the 'territorial integrity of States' is a primary rule; when breached it gives rise to secondary rules or obligations (or powers), concerning cessation of the unlawful act, reparation of damages, and so on.

It stands to reason that this distinction is only relative in nature, albeit it is easy to grasp when looked at summarily. First, there are some legal categories which straddle both poles,<sup>17</sup> such as circumstances precluding wrongfulness, e.g. consent. The consent by the victim State displaces or modifies the primary rules applicable in a certain context, e.g. by allowing the deployment of foreign troops on the territory and thus making an exception to the rule on territorial integrity. This state of affairs can be described as a change within the primary rules, i.e. the carving out of an exception in the primary obligation. It then remains aloof from the secondary rules describing consequences of responsibility. Alternatively it can be seen as a secondary rule in the sense that it precludes the unlawfulness of a conduct, i.e. erases a consequence flowing from breach. There are also other areas where the line of distinction between the primary and the secondary level is thin, such as in the context of liability for lawful dangerous (or ultra-hazardous) activities. The various obligations of vigilance, prevention and control contained in several applicable legal instruments are mainly primary rules

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<sup>15</sup> D. Müller, 'The Work of García Amador on State Responsibility for Injury Caused to Aliens', *ibid.*, pp. 69ff.

<sup>16</sup> This was noted by R. Ago in his *First Report on the Responsibility of States*, *YbILC*, 1969-II, §§ 88ff. See *YbILC*, 1963-II, p. 227 and p. 252.

<sup>17</sup> E. David, 'Primary and Secondary Rules', in: Crawford, Pellet and Olleson, p. 31.

for preventing harm. But they sometimes also flow from breaches of other rules. Second, there is a more profound reason for the relativity of the distinction. When there is a breach of a primary obligation, a duty of reparation arises (the 'secondary obligation'). But this obligation can be breached in turn, i.e. the responsible State may refuse to honour it, or may not honour it fully. Looked at from this perspective, the secondary obligation has become a primary obligation whose breach produces a new secondary obligation for reparation; and so on. Secondary obligations are thus primary or secondary according to context; or else they could be described as 'tertiary', 'quartary', and so on, obligations. It stands to reason that it would be quixotic to add up piles of such replicated obligations of reparation. If the wrongdoing State steadfastly refuses to make reparation, the only way out of the quagmire is either to seek a mechanism for settling the dispute (if the wrongdoing State agrees to honour its outcome) or then to take CM. Overall, it can be said that the distinction between primary and secondary obligations is a useful tool for understanding the rules of State responsibility, which are inherently 'meta-rules' attached to certain occurrences within the primary realm of international legality. But at the same time, the distinction should not be overstressed or overworked.

## 5. HISTORICAL EVOLUTION OF THE LAW OF STATE RESPONSIBILITY

It may be considered strange that the formation of a 'general part' of the law of State responsibility, detached from the many specific subject matters in which it could operate, occurred only late, at the beginning of the 20th century, and that formerly the law of State responsibility was at best in its infancy. Indeed, it could justifiably have been expected that such a cardinal function within the law as is the one of responsibility ought to have given rise much earlier to a fully fledged legal doctrine, firm in its lines and consolidated in its body. There were concrete reasons why this did not occur. The main reason is that classic international law was not based on the principles of peaceful settlement of disputes and non-use of force. When such modern principles develop, in the context of the rising arm of peaceful settlement of disputes, rules for the reparation of wrongs have to take shape so as to be applied by arbitral commissions and other settlement bodies. In classical international law, disputes (among which claims for responsibility are placed) were mainly settled either by direct negotiation or, if unsuccessful, by forcible measures or by war. In both situations, precise principles of a body of State responsibility

were not necessary. The wrongdoing and the aggrieved State could agree as they saw fit in their direct dealings and liquidate the wrong by lump sums or various remedies. The treaty mechanism here overshadowed the responsibility issues. As the States concerned were masters of their agreement, they did not need precise external guidelines on how to liquidate the tort committed. By the same token, if these States ultimately ushered in warfare, the legal issues turned towards the *jus in bello*, including neutrality, and were not concentrated on responsibility. Therefore, it is not by accident that the law of State responsibility took shape in the latter part of the 19th and at the beginning of the 20th century, when efforts were made to codify the peaceful settlement of disputes and to tame the unilateral right of each State to use force.

The modern law of State responsibility has progressively developed, mainly through the international legal rules on the treatment of aliens and in particular the old notion of reprisals.<sup>18</sup> When a citizen of a public collectivity was denied his rights in a foreign collectivity, the ruler of the aggrieved subject could issue letters of reprisals whereby the aggrieved subject could, if he did not obtain justice, seize the goods and assets of subjects of the wrongdoing collectivity, wherever he could put hands on them. The condition for the issuing of such letters of reprisals was a 'denial of justice' in the foreign collectivity. Hence there was also from that time an embryonic law on the exhaustion of local remedies. This form of responsibility was collective: all the citizens of the collectivity were responsible for the torts of each of its members. The 'attribution' of the wrong to the whole collectivity is still visible in the famous doctrine of Grotius<sup>19</sup> on *patientia et receptus*, i.e. tolerance and complicity: by not providing justice to the aggrieved foreigner, the State as a whole becomes a sort of accomplice; it is at fault and its responsibility flows therefrom.

A new impetus for the law of State responsibility arrived in the 19th century when States had a denser practice of diplomatic claims and a more frequent recourse to arbitration. The issues surfacing most often in

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<sup>18</sup> See P. Hagenmacher, 'L'ancêtre de la protection diplomatique: les représailles de l'ancien droit (XIIe–XVIIIe siècles)', *Relations internationales*, no. 143, 2010-III, pp. 7ff. The law of reprisals of the classical mode is still largely developed by E. de Vattel, *Le droit des gens* (1758), liv. II, chap. XVIII, §§ 342ff. On the historical evolution of State responsibility see also the short indications in Crawford, *State*, pp. 3ff; Brownlie, *System*, pp. 1ff; Anzilotti, *Teoria*, pp. 1ff. See also Eagleton, *Responsibility*, pp. 1ff.

<sup>19</sup> *De Jure Belli Ac Pacis* (1625), lib. II, cap. 21, § 2, 2. On this *culpa* doctrine, see e.g. G. Cohn, 'La théorie de la responsabilité internationale', *RCADI*, vol. 68, 1939-II, pp. 240ff.

the context of these claims were precisely linked to responsibility for breach of an international obligation. In the diplomatic exchanges and mainly in the arbitral practice, principles and rules on responsibility progressively took shape.<sup>20</sup> It should, however, be noted that the law of State responsibility remained for a long time essentially linked to the law of the treatment of aliens under the so-called minimum or national standard, and also diplomatic protection. This remained the main focus of that branch of the law up to the 1960s when the Ago revolution within the ILC took place and the new concept of primary and secondary obligations was shaped. Thus, issues of damage done to aliens (through expropriation, arrest, murder, etc.) were for a long time at the core of our subject matter. Some authors could still discuss the law of State responsibility as late as in the 1960s by adopting only the lens of international claims for damages done to aliens (especially in the US, which was and is an important capital and manpower-exporting country).<sup>21</sup>

In the legal literature,<sup>22</sup> the first embryonic treatment of the subject matter in a separate section and with a 'general approach' – rather than through an old-fashioned intermingling of primary and secondary rules of the various areas of international law – is to be found in the textbook of A. G. Heffter.<sup>23</sup> However, even this pioneering discussion still only foreshadows a modern doctrine of State responsibility. The gist of the seven pages devoted to our subject matter by the German author is that the wrongdoing State must offer a reparation for the infringement of an international obligation; otherwise, the aggrieved State can take unilateral measures of reprisal or protection, or proceed to war.<sup>24</sup> In addition, we find in Heffter a distinction between bilateral obligations, where only the directly injured State can react, and obligations mirroring general rights of all nations, which give rise, when breached, to a generalized right of reaction.<sup>25</sup> Questions of imputation or attribution were not significantly addressed. The merit in having focused on the latter issue is due to

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<sup>20</sup> For 19th-century arbitrations, see e.g. H. La Fontaine, *Pasicrisie internationale*, Berne, 1902.

<sup>21</sup> See e.g. W. W. Bishop, 'General Course of Public International Law', *RCADI*, vol. 115, 1965-II, pp. 384ff.

<sup>22</sup> For a survey, see Crawford, *State*, pp. 20ff.

<sup>23</sup> *Le droit international de l'Europe*, Berlin/Paris, 1883, pp. 226–232 (original German edition in 1857). For an older monographic treatment of some aspects of internationally unlawful acts, see J. P. de Ludewig, *De juris gentium leasionibus*, Halle, 1741.

<sup>24</sup> A. G. Heffter, *Le droit international de l'Europe*, Berlin/Paris, 1883, p. 227.

<sup>25</sup> *Ibid.*

H. Triepel.<sup>26</sup> In his 1899 treatise, he addressed mainly questions of imputation, neglecting issues relating to the unlawful act. Thus, the modern essential division of the 'general part' on responsibility, constructed around the poles of the 'wrongful act' and 'attribution' could slowly take shape. These forerunners of a law of international responsibility led to the first fully fledged and essentially modern treatment of the subject matter by D. Anzilotti in 1902.<sup>27</sup> It was based on the two main elements of the 'wrongful act' and 'attribution', which were now brought together. From this firm starting point, R. Ago, among others, could develop the doctrine further.<sup>28</sup> At the same time, two important studies by American authors completed this formative stage. Both had laid some stress on attribution issues.<sup>29</sup> Overall, it can be said that the interest of the (mainly German and Italian) 'positivists' of the turn of the 19th to the 20th century in issues of responsibility stemmed from the fact that it allowed them to 'complete' the international legal system. Only some form of 'sanctioned' law is true law for the positivistic doctrine; only a legal system incorporating responsibility is therefore a complete legal order. Thus, international law had to develop the concept of State responsibility if it wanted to become a true legal order.

Apart from this doctrinal shaping of the subject matter, the law of State responsibility remained for a long time largely jurisprudential. The principles and rules of its body were of a customary nature. The various arbitration tribunals of the 19th and beginning of the 20th centuries have played a great part in the formation of this customary law.<sup>30</sup> Their case law was accepted by States and entered into the body of common international law. The fact that there were so many scattered materials, which were often difficult to analyse due to the overwhelming number of special circumstances, types and content of claims, and also special jurisdictional issues, for a time made it difficult to systematize the whole body of the law of responsibility in detail. It is beyond doubt that the works of the ILC largely contributed to clarification and systematization.

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<sup>26</sup> *Völkerrecht und Landesrecht*, Leipzig, 1899, pp. 324–381.

<sup>27</sup> *Teoria*, pp. 83ff.

<sup>28</sup> 'Délit' (1939). On the contribution of the Italian school to the modern law of State responsibility see G. Distefano and R. Kolb, 'Some Contributions and Influence of the Italian Doctrine of International Law', forthcoming.

<sup>29</sup> E. M. Borchard, *The Diplomatic Protection of Citizens Abroad*, New York, 1916; Eagleton, *Responsibility*.

<sup>30</sup> See the *RIAA* series for international arbitrations and the Reports of R. Ago (quoted in the final bibliography) where he draws heavily on that sometimes ancient practice.

To some degree, the modern law of State responsibility is due to the conjunction of three efforts: jurisprudence, pioneering authors and above all the ILC.

## 6. RESPONSIBILITY AND SOVEREIGNTY

An important historical issue has been the compatibility of principles of State responsibility with the very concept of State sovereignty. It has been said above (Section 1) that the notion of responsibility is essentially linked to the notion of the binding nature of the law. But this in turn triggered questions with regard to sovereignty. In the old conceptions of 'absolute sovereignty',<sup>31</sup> notably in the Hegelian line of thought,<sup>32</sup> a law binding on the State could be regarded in itself as contrary to sovereignty: a State bound by a rule is no longer free to decide as it sees fit; it is then no longer sovereign. And indeed, there were more than a handful of authors<sup>33</sup> who claimed that a law of State responsibility could not exist, since it would bluntly contradict sovereignty, which was manifestly the fundamental norm of classical international law; or, in an alternative argument, sovereignty at least limited the domain of responsibility.<sup>34</sup> An effort was made by the first authors discussing the law of international responsibility also to combat and rebut this excessive notion of sovereignty, and to show that it was incompatible with the existence of a legal

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<sup>31</sup> See N. Politis, *Les nouvelles tendances du droit international*, Paris, 1927, pp. 18ff.

<sup>32</sup> On this school of international law, see the short remarks in A. Truyol y Serra and R. Kolb, *Doctrines sur le fondement du droit des gens*, Paris, 2007, pp. 25–26.

<sup>33</sup> See e.g. A. Lasson, *Princip und Zukunft des Völkerrechts*, Berlin, 1871, pp. 12ff; T. Funck-Brentano and A. Sorel, *Précis du droit des gens*, Paris, 1877, p. 224: 'L'idée d'une responsabilité réciproque des Etats est contradictoire avec l'idée de souveraineté'; P. Pradier-Fodéré, *Traité de droit international public européen & américain*, vol. I, Paris, 1885, pp. 329–330. These authors may concede that States do pay damages or grant satisfactions, but not as a matter of strict right, rather as a matter of conciliation in the interest of the maintenance of peace. For a critique of such theories, see e.g. G. Cohn, 'La théorie de la responsabilité internationale', *RCADI*, vol. 68, 1939-II, p. 239. It stands to reason that such a doctrine of non-responsibility is no longer defended by any international lawyer.

<sup>34</sup> E.g. by the restrictive typology of IWA, by the national standard of protection of foreigners, by the refusal of any criminal law responsibility, etc. See the criticism in H. Lauterpacht, 'Règles générales du droit de la paix', *RCADI*, vol. 62, 1937-IV, pp. 339ff.

order. As has been rightly emphasized: '[T]he law of responsibility was a reaction against theories of auto-limitation and the emphasis on unfettered notions of state sovereignty'.<sup>35</sup>

The development of the law of State responsibility was therefore one of the markers which allowed the progressive reshaping of the concept of sovereignty and thereby a greater understanding of it to be reached. This concept indicates the power of the State to *decide* as a last resort, without being subjected to the control of a higher human body. Conversely, it does not mean to be exempted from any higher or any binding rule. Quite to the contrary, it is the privilege of the State to be subjected *only* to the rules of international law. If the concept of sovereignty is extended beyond these bounds, it is manifestly at odds with the existence of a binding international legal order. From the legal standpoint, this would be contradictory: sovereignty is at once granted and recognized by international law; it cannot at the same time annihilate the legal order which institutes, bears and protects it. The correct position is therefore that responsibility is but an expression of sovereignty. We may paraphrase the celebrated dictum of the PCIJ in the *Wimbledon* case of 1923: 'The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. ... [T]he right of entering into international engagements is an attribute of State sovereignty'.<sup>36</sup> It is sufficient to replace the words 'conclusion of a treaty' with 'incurring of responsibility'.

## 7. ANALOGIES WITH MUNICIPAL LAW

Another issue which often surfaced in the formative stages of the law of State responsibility is the extent to which it could be built on legal instruments and conceptions borrowed by analogy from municipal law experiences. The concept of responsibility encapsulates a general function of law; as such, it can be found in all legal orders. Its operation is not entirely or even significantly different from one legal order to another; the ways to respond to the breach of the law are roughly the same. Therefore, it is natural for lawyers to draw on concepts, rules and systems they are familiar with, and which have proven to function in the municipal sphere. It is easy to trace back to civil law conceptions many utterances of arbitrators in the formative stage of the law of State

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<sup>35</sup> Crawford, *State*, p. 25.

<sup>36</sup> PCIJ, ser. A, no. 1, p. 25.

responsibility. A classic example is the famous *Naulilaa* case (1928), which was decided by three Swiss civil lawyers.<sup>37</sup> In particular, questions of triggering mechanisms, of circumstances precluding wrongfulness, and of reparation (including the calculation of damages) have been intensely harvested on the soil of civil law analogies. The same cannot be said of the other branch of responsibility, namely CM. This institution is genuinely international. It flows from the decentralized nature of international society. So true is this that, as we have seen, some authors do not consider CM to be part of the province of State responsibility at all. An issue which has given rise to close civil law analogies is the one relating to 'fault'. We shall discuss this point later (see Section 10). At this stage it may simply be noted that classical civil responsibility in municipal law requires the demonstration of some fault, i.e. negligence or intention, with regard to the harmful act or omission. Thus, for a long time the doctrine of State responsibility has remained linked to the conception of fault drawn from municipal law analogies.<sup>38</sup>

We may leave aside the question of how useful private law analogies are and to what extent they are dangerous in the context of international law.<sup>39</sup> With regard to State responsibility merely some brief points must be made. First, municipal law analogies were useful mainly in the formative stage of the doctrine of State responsibility. Today there is a fully fledged doctrine of responsibility in international law. It has recourse to municipal law analogies that are less urgent and to some extent less cogent. However, in some areas where the law is still developing, such as in the context of duties of 'mitigation of damage', which will be discussed later,<sup>40</sup> the consideration of municipal law experiences may still be rewarding. Second, the analogy with private municipal law responsibility may be less relevant for issues of State responsibility than the analogy with public municipal law responsibility (i.e. State responsibility in the realm of municipal law). Thus, for example, while in private law the requirement of fault is generally applicable, for public law responsibility the municipal legal experience shows that the breach of obligation is sufficient to trigger responsibility

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<sup>37</sup> *RIAA*, vol. II, pp. 1011ff.

<sup>38</sup> Cf. H. Lauterpacht, *Private Law Sources and Analogies of International Law*, London, 1927, pp. 134ff.

<sup>39</sup> See the contrasted appraisal in Lauterpacht, *ibid.* and in E. Raftopoulos, *The Inadequacy of the Contractual Analogy in the Law of Treaties*, Athens, 1990 or in H. Thirlway, 'Concepts, Principles, Rules and Analogies: International Law and Municipal Legal Reasoning', *RCADI*, vol. 294, 2002, pp. 265ff.

<sup>40</sup> See Chapter 5.

and that no evidence of fault must be provided. On the whole, for its triggering mechanisms international State responsibility is closer to municipal public responsibility than it is to private law responsibility. At the same time, international State responsibility has traditionally drawn heavily on private law responsibility in many areas, such as for its mainly bilateral nature and for the calculation of damages.<sup>41</sup> The reason why authors writing some decades ago were fixated on private law responsibility and not on public responsibility is that the latter developed rather late and was in its infancy during the formative stage of the law of international State responsibility.

## 8. STATE RESPONSIBILITY AND INTERNATIONAL RESPONSIBILITY

State responsibility refers to the responsibility of the main subject of international law, the State. The breach of the law here occurs in the context of an inter-State relationship: a State is the wrongdoer and a State is the aggrieved entity. International responsibility refers to the larger context of the dealings of all international subjects, i.e. all entities and persons possessing a degree of international legal personality.<sup>42</sup> The general principle is that all legal persons of a legal order are also responsible for breaches of the law that they commit.<sup>43</sup> It is true that practice of international responsibility with regard to subjects other than

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<sup>41</sup> See e.g. H. Rolin, 'Les principes de droit international public', *RCADI*, vol. 77, 1950-II, pp. 441ff; A. Mahiou, 'Le droit international ou la dialectique de la rigueur et de la flexibilité', *RCADI*, vol. 337, 2008, pp. 410ff. The over-development of responsibility with regard to the domain of nullities has also been considered to be a hallmark of the primitive character of international law: C. Rousseau, 'Principes de droit international public', *RCADI*, vol. 93, 1958-I, p. 521.

<sup>42</sup> On the responsibility of non-State entities, see the contributions in Crawford, Pellet and Olleson, pp. 317ff. As Max Huber rightly emphasized in the *Spanish Zone of Morocco* case (1925): 'All rights of an international character involve international responsibility' (*RIAA*, vol. II, p. 641). The issue is thus one of international obligation and international legal personality, not one of being a State.

<sup>43</sup> The old-fashioned view according to which only States can be held responsible under international law (see K. Strupp, 'Les règles générales du droit de la paix', *RCADI*, vol. 47, 1934-I, p. 559) has been abandoned. For a modern position, see J. Verhoeven, 'Considérations sur ce qui est commun: Cours général de droit international public', *RCADI*, vol. 334, 2008, pp. 197ff.

States is rather sparse, however, the principles of State responsibility are applied by analogy to other entities. This fact shows once again the fundamental unity of the rules of responsibility.

The relative paucity of relevant practice for non-State entities or persons has many reasons. First, the subjects of international law other than States are either newcomers in the international arena or remain relatively marginal in international political affairs. This fact hardly enhances their status as active or passive subjects of international responsibility mechanisms. Second, some of them can hardly commit significant international wrongs, e.g. the International Committee of the Red Cross (ICRC) (but they may suffer from such wrongs, e.g. the killing of ICRC delegates enjoying some form of agreed protection or immunity). Third, there are jurisdictional hurdles. These other subjects are in most cases not entitled to appear as parties in international tribunals, so that the case law remains naturally marginal as regards them. Fourth, there are many practical problems in attaching responsibility to other subjects, e.g. insurrectional movements or armed groups. These groups do not even have fixed addresses or easily seizable bank accounts. Fifth, there is for such practical reasons a tendency to return to the responsibility of the State. This is pursued through a series of positive obligations of due diligence, for example that the State has to ensure human rights and provide order on its territory even when plagued by armed conflicts and sometimes, to the extent feasible, even in parts of the territory controlled *de facto* by rebels.<sup>44</sup> Sixth, many issues of responsibility involving individuals or other subjects of international law are ultimately settled in municipal law under municipal law statutes (some of them being closely linked to international law issues, such as the Alien Tort Claims Act in the US, 1789<sup>45</sup>); or alternatively they give rise to criminal individual responsibility sanctioned through international criminal tribunals, like the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) or International Criminal Court (ICC).

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<sup>44</sup> See e.g. at the European Court of Human Rights (ECtHR), *Illascu v. Moldavia and Russia* (2004), §§ 333ff; *Ivantoç v. Moldavia and Russia* (2011), § 105; *Catan v. Moldavia and Russia* (2012), § 109; *Sargsyan v. Azerbaidjan* (2015), §§ 14ff.

<sup>45</sup> Several claims for reparation in the context of international crimes relating to torture, war crimes or crimes against humanity have been brought to US tribunals under that Act, e.g. *A. R. Omar Adra* case (US, District Court of Maryland, 1961) *ILR*, vol. 32, pp. 1–4; *Kadic v. Karadzic* (2nd Cir., 1995) *ILR*, vol. 104, p. 136.

However, there are also cases where such responsibility of other entities than States has been pursued or even codified. In the context of investment law, the principles of State responsibility are applied by analogy in the relationship between the State and the investor.<sup>46</sup> Normally, the investor claims against the State for reparation; but States have sometimes presented counterclaims or even claimed themselves directly. Furthermore, the law of responsibility of international organizations has given rise to a set of articles of the ILC largely inspired by the Articles on State Responsibility for Internationally Wrongful Acts adopted in 2001.<sup>47</sup> A final example is the responsibility of armed groups (insurgents).<sup>48</sup> Thus, the UK presented claims for unlawful acts to the Confederacy during the American Civil War and to the nationalist government of Spain during the Spanish Civil War.<sup>49</sup> In many cases the claims in this extra-State context led to *ex gratia* or other types of special settlements. Overall, the law of international responsibility (as distinct from State responsibility) still falls to be developed in many aspects.

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<sup>46</sup> On the international law of responsibility in the context of investment disputes, see M. Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility', *EJIL*, vol. 24, 2013, pp. 617ff; K. Hober, 'State Responsibility and Investment Arbitration', *Journal of International Arbitration*, vol. 25, 2008, pp. 545ff. See also United Nations legislative Series, *Materials on the Responsibility of States for Internationally Wrongful Acts*, New York, 2012 (Doc. ST/LEG/SER.B/25).

<sup>47</sup> Draft Articles on the Responsibility of International Organizations, 2011, UN Doc. A/66/10, p. 52. See also *Immunity from Legal Process* advisory opinion, ICJ, *Reports*, 1999, pp. 88–89, § 66. On the law of responsibility for conduct of international organizations, see P. Klein, 'The Attribution of Acts to International Organizations', in: Crawford, Pellet and Olleson, pp. 297ff; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Brussels, 1998. See further B. Dold, *Vertragliche und ausservertragliche Verantwortlichkeit im Recht der internationalen Organisationen*, Ph.D thesis, Zurich, 2006, pp. 47ff; M. Hirsch, *The Responsibility of International Organizations Towards Third Parties*, Dordrecht, 1995; M. Perez-Gonzales, 'Les organisations internationales et le droit de la responsabilité', *RGDIP*, vol. 92, 1988, pp. 63ff.

<sup>48</sup> See L. Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge, 2002.

<sup>49</sup> See Crawford, *State*, p. 181. See generally G. Cahin, 'Armed Bands and Criminal Groups', in: Crawford, Pellet and Olleson, pp. 331ff.

## 9. TYPES OF 'CIVIL' RESPONSIBILITY

The system of State responsibility is basically a system of 'civil' responsibility, i.e. a set of norms for the cessation and reparation of the wrongful act. It is only recently that criminal law aspects have also developed, and even then these aspects remained limited to natural persons and were not extended to States.<sup>50</sup> To the civil limb of responsibility we have now to add the law of international sanctions and CM, which are a distinctive feature under international law. There are basically three types of civil (non-criminal) responsibility in the various municipal legal systems. The first system is based on 'responsibility for fault'. The consequences of responsibility are triggered here only if fault of the responsible entity can be established, either by malicious intent or by negligence. The burden of proof of such fault ordinarily lies on the claimant (*onus probandi incumbit actori*). The second system is based on 'strict responsibility' (*responsabilité objective relative*). The wrongdoing entity is here responsible for the breach of some obligation incumbent upon it, i.e. for the breach of legality. However, the law allows that entity to ward off the main consequences of responsibility by invoking successfully one or more recognized 'circumstances precluding wrongfulness'. This means that the burden of proof is shifted: it is incumbent on the wrongdoing State to successfully prove the existence of the conditions allowing the invocation of a circumstance precluding wrongfulness. The third system is based on 'absolute responsibility' (*responsabilité objective absolue, responsabilité pour risque*). Here a person is liable for damage caused in the sphere of another subject if it can be proved that the person's action caused the damage. This type of liability is normally applicable to lawful but dangerous activities (ultra-hazardous activities).<sup>51</sup> The operator of such activities is liable as if it were an insurer. The constitutive element of liability is not a wrongful act, but the mere causation of damage. The burden of proof lies on the claimant for

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<sup>50</sup> On the fate of article 19 of the 1980 Draft, see Crawford, *State*, pp. 362ff. On the issue of punitive damages and the ILC Articles, see Crawford, *State*, p. 523. See generally J. Crawford, 'International Crimes of States', in: Crawford, Pellet and Olleson, pp. 405ff, and the literature quoted there.

<sup>51</sup> It was developed in the 19th century, when new industrial activities that were socially useful caused damage. Thus, for example, the first steam trains inevitably produced sparks, which caused the burning of property located near the railway line. The point could not have been to prohibit the running of trains, but to set up liability for risk, without the necessity to show an unlawful act.

establishing the damage and the causation. This can sometimes be difficult. Such 'insurer liability' is contained in special legislation.

In international law, all three types of responsibility can be found. However, the first and the third types are rooted exclusively in particular international law, i.e. in special treaty regimes. Responsibility for fault is not the common law responsibility or the ordinary regime of responsibility. It rather flows from primary rules when these require some form of diligence<sup>52</sup> or mention some element of fault as required conduct.<sup>53</sup> In such a case, fault is necessary for breaching the norm. There is no internationally wrongful act under that norm if fault is not established. Example: there is no act of genocide under international law if the wrongdoer does not intend to destroy, in whole or in part, a protected group.<sup>54</sup> Liability for lawful activities is based on treaties providing for it, i.e. once again on specific primary rules. The main primary rules in this area are the following: (i) there are duties of prevention (procedures for the authorization and control of dangerous activities, risk assessment studies, measures to minimize risks, due diligence duties, etc.); (ii) there are also duties of information, notification and consultation with other concerned States.<sup>55</sup> Under particular international law (treaty regimes) further specific duties are set out. Thus, the Convention on International Liability for Damage Caused by Space Objects (1971) considers that the

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<sup>52</sup> G. Morelli (translation by R. Kolb), *Notions de droit international public*, Paris, 2013, p. 259.

<sup>53</sup> R. Higgins, 'International Law and the Avoidance, Containment and Resolution of Disputes', *RCADI*, vol. 230, 1991-V, pp. 211ff.

<sup>54</sup> See article 2 of the Genocide Convention of 1948. On this provision and intent: P. Gaeta (ed), *The UN Genocide Convention, A Commentary*, Oxford, 2009, pp. 105ff.

<sup>55</sup> On these 'liability'-based regimes, see the various contributions in Crawford, Pellet and Olleson, pp. 503ff; and see also R. M. Bratspies and R. A. Miller (eds), *Transboundary Harm in International Law, Lessons From the Trail Smelter Arbitration*, Cambridge, 2006; R. Lefeber, *Transboundary Environmental Interference and the Origin of State Liability*, The Hague, 1996; J. Barboza, 'International Liability for the Injurious Consequences of Acts not Prohibited by International Law and the Protection of the Environment', *RCADI*, vol. 247, 1994-III, pp. 291ff; C. Tomuschat, 'International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law', in: F. Francioni *et al.* (eds), *International Responsibility for Environmental Harm*, Dordrecht, 1991; P. M. Dupuy, *La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle*, Paris, 1976. See generally A. Douhan, 'Liability for Environmental Damage', in: *Max Planck Encyclopedia of Public International Law*, vol. VI, Oxford, 2012, pp. 830ff and A. Tanzi, 'Liability for Lawful Acts', *ibid.*, pp. 837ff, with many references.

State of launching of the space object shall be liable for all damages caused by that object.<sup>56</sup> It should be noted that liability regimes remain linked with the general regime of responsibility for internationally wrongful acts (IWAs). Thus, it is an IWA to allow the use of the territory of a State in a way that infringes the rights of another State. The breach of that duty leads back to international responsibility for IWAs. The duty is here one of due diligence not of absolute liability. This latter rule remains applicable also in the context of ultra-hazardous activities.

The common law type of responsibility, under general international law, is the second type. The ordinary consequences of responsibility flow from the breach of a legal obligation incumbent upon a State; but the latter can invoke circumstances precluding wrongfulness. This is the basis of the ILC Draft adopted by the UN General Assembly (UNGA) in 2001: articles 1 and 20–25.<sup>57</sup> This leads us to the main constitutive elements of international responsibility or State responsibility.

## 10. CONSTITUTIVE ELEMENTS OF STATE RESPONSIBILITY

The main two triggering elements of State responsibility are the IWA (breach of an obligation) and the ‘attribution’ of this act to a subject of international law, in our context a State as defined by international law. Thus, article 1 of the ILC Articles on State Responsibility for Internationally Wrongful Acts of 2001 (hereinafter: ASR) states in simple, precise and concise terms: ‘Every internationally wrongful act of a State entails the international responsibility of that State.’<sup>58</sup> The act must thus be wrongful; and it must be an act of a State. The term ‘entails’ and not for example ‘triggers’ emphasizes the relationship of immediacy: responsibility is implicit in the violation of the obligation and in the fact that it is the act of the State; it is not added to or grafted upon such facts from the outside. Then comes the third element: the ‘circumstances precluding wrongfulness’, through which the main consequences of responsibility will not ensue for the State successfully invoking them. If there are no such circumstances, or if they cannot be proved, the consequences of responsibility<sup>59</sup> will follow: mainly cessation, reparation

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<sup>56</sup> See M. Forteau, ‘Space Law’, in: Crawford, Pellet and Olleson, pp. 904ff.

<sup>57</sup> Crawford, *ILC’s*, pp. 77ff, 160ff.

<sup>58</sup> See Ago, Third Report, § 30ff; Crawford, *ILC’s*, pp. 77ff.

<sup>59</sup> It may well be said that the duty to make reparation is not the ‘consequence of responsibility’, but rather that ‘responsibility is the obligation to make

and possibly CM. Thus, the fundamental scheme of responsibility is based on the following elements: IWA, attribution (AT); absence of circumstances precluding wrongfulness (CPW); cessation, reparation or CM.

Article 1 of the ASR is remarkable also for what it does not include. First, there is no mention of the requirement of *damage*.<sup>60</sup> The question of damage is not a definitional element of responsibility if it is used in the context of indemnity.<sup>61</sup> According to the type of damage suffered, material (pecuniary) or moral, the forms of reparation will vary: article 36, compensation, is for monetary damage; article 37, satisfaction, is for moral damage (which includes the simple infringement of the legal obligation). Damage is also a constitutive element for triggering responsibility. It can even be said that damage is implicit in every violation of an obligation<sup>62</sup> since international responsibility extends to the remedy of satisfaction, for example the formulation of regret by the wrongdoing State.<sup>63</sup> Responsibility under international law thus has some specificities in this regard in comparison with its municipal law counterparts.

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reparation': B. Stern, 'The Elements of an Internationally Wrongful Act', in: Crawford, Pellet and Olleson, p. 194. However, this lexical distinction may be somewhat too fine for the rough jurisprudence of nations, as it were, and moreover it is misleading. Responsibility is not limited to the duty to make reparation as the phrase suggests.

<sup>60</sup> The primary obligation itself may, however, impose a requirement of damage: see e.g. the *Responsibilities and Obligations of States Sponsoring persons and Entities with Respect to Activities in the Area* opinion (2011), ITLOS, *ILR*, vol. 150, p. 291, § 178, in the context of article 139, § 2, of the UN Law of the Sea Convention of 1982.

<sup>61</sup> But that can also be interpreted as meaning that some immaterial damage is inherent in the breach of the rule itself: see e.g. P. Cahier, 'Cours général de droit international public: Changements et continuité du droit international', *RCADI*, vol. 195, 1985-VI, pp. 286–287; R. Higgins, 'International Law and the Avoidance, Containment and Resolution of Disputes', *RCADI*, vol. 230, 1991-V, pp. 216–218. Some authors continued to maintain that an element of damage is required: see e.g. E. Jiménez de Aréchaga, 'International Law in the Past Third of a Century', *RCADI*, vol. 159, 1978-I, pp. 267–268, but it is then claimed that moral damage is enough.

<sup>62</sup> R. Ago, Third Report, § 74.

<sup>63</sup> On the issue of damage, see R. Ago, Third Report, §§ 73–74; B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale*, Paris, 1973; Crawford, *State*, pp. 54ff, 485ff.

Second, *fault* is not a requirement for responsibility.<sup>64</sup> Sometimes the term *fault* designates simply the IWA; but it is not taken in that sense here, which would render it redundant.<sup>65</sup> Traditionally, international legal doctrine required some *fault* for triggering international responsibility. This rendered the whole concept of responsibility more compatible with sovereignty, since the only guarantee undertaken with regard to other States was not to violate some standard of subjective righteousness, a fact which limited the reach and number of cases of responsibility. There was also another reason for this predilection: the fact that responsibility was situated mainly in the area of the treatment of aliens and that private law

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<sup>64</sup> On *fault* and responsibility there is a vast literature: see e.g. M. Kuhn, *Verschuldens- oder Erfolgshaftung der Staaten im allgemeinen Völkerrecht*, Ph.D. Geneva, 1961; K. Zemanek, 'Schuld- und Erfolgshaftung im Entwurf der Völkerrechtskommission über Staatenverantwortlichkeit', *Essays in Honor of R. Bindstedler*, Berne, 1980, pp. 315ff; Anzilotti, *Teoria*, pp. 123ff; Schoen, *Völkerrechtliche*, pp. 50ff; Ago, 'Délit', pp. 476ff; Brownlie, *System*, pp. 38ff; Crawford, *State*, pp. 60–62. Some authors have argued quite strenuously in favour of the requirement of *fault*: see e.g. H. Lauterpacht, *Private Law Sources and Analogies of International Law*, London, 1927, pp. 134ff; H. Lauterpacht, 'Règles générales du droit de la paix', *RCADI*, vol. 62, 1937-IV, pp. 359ff; less strenuously, see e.g. H. Mosler, 'The International Society as a Legal Community', *RCADI*, vol. 140, 1974-IV, pp. 170–171, 179. For a discussion of the difficulties of *fault* in the context of dualism, see Anzilotti, *Teoria*, pp. 127ff, and on this D. Alland, *Anzilotti et le droit international public*, 2nd ed., Paris, 2013, pp. 132ff (the problem being how *fault* could be determined since the organ will in some cases have acted as municipal law prescribes). A. Cavaglieri 'Règles générales du droit de la paix', *RCADI*, vol. 26, 1929-I, p. 551, considers that international responsibility must be objective in nature for elementary reasons of legal security, i.e. the necessity to guarantee other States against each violation of their rights. This position was often defended in the doctrine prior to the ASR, e.g. in J. Basdevant, 'Règles générales du droit de la paix', *RCADI*, vol. 58, 1936-IV, pp. 668ff; P. Guggenheim, 'Les principes de droit international public', *RCADI*, vol. 80, 1952-I, pp. 148–149; E. Jiménez de Aréchaga, 'International Law in the Past Third of a Century', *RCADI*, vol. 159, 1978-I, pp. 269ff; I. Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations', *RCADI*, vol. 255, 1995, p. 95; K. Zemanek, 'The Legal Foundations of the International System', *RCADI*, vol. 266, 1997, pp. 262ff; C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', *RCADI*, vol. 281, 1999, pp. 281ff.

<sup>65</sup> J. Basdevant, 'Règles générales du droit de la paix', *RCADI*, vol. 58, 1936-IV, p. 672, footnote 2 rightly states: 'La faute ayant un caractère subjectif, le manquement aux obligations un caractère objectif, dire qu'il y a faute à manquer à ses obligations internationales, c'est mêler deux notions qui, logiquement, sont distinctes'.

analogies were favoured in that subject matter (notably with the famous theory of *patientia* and *receptus* of Grotius<sup>66</sup>). The responsibility for such wrongs was then limited to ‘denials of justice’, i.e. to fault or complicity. It may be added that the general civil law position was to require fault as an element of responsibility. Legal doctrine imagined many different ways in which fault could be relevant: (i) either the breach of all international obligations assumed fault in order to trigger responsibility; (ii) or alternatively the responsibility for the action of the State through its own organs assumed fault, but not the responsibility for acts done by individuals for which the State was strictly liable; (iii) or vice versa, a State was to be responsible for its own action without a requirement of fault, but for acts of individuals it was to be responsible only if its own organs committed some fault (breach of due diligence); (iv) or still alternatively, the responsibility for actions was not based on fault and the responsibility of omissions was based on fault; (v) or finally, reparation did suppose the existence of fault, but the claim for satisfaction was independent from it and did not assume fault.<sup>67</sup> In the wake of the codification of the ILC, the element of fault was finally abandoned. There were four main reasons for this course:

- (i) It had been understood that the question of fault could not be determined generally, at the level of secondary rules, but depended on the applicable primary law; the element of fault was thus referred to the content of the primary norm.<sup>68</sup>
- (ii) It had also been understood that the better analogy is the one with the public municipal law responsibility of the State, where fault is not a necessary element. What States are promising each other is that they will respect the obligations they agree to, i.e. international legality, not that they will not maliciously or negligently breach the standards of expectation.
- (iii) It had finally been understood that the abandonment of fault led to a simplification of the system of responsibility and the setting aside of an element which could easily be invoked in order to try to flout the consequences of a breach of the law. As has been forcefully said:

The *culpa*-doctrine works in favor of the principle of sovereignty, for it cannot help reducing the chances of a defendant being held responsible

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<sup>66</sup> See above, Section 5.

<sup>67</sup> On all these positions, see Ago, ‘Délit’, pp. 476ff.

<sup>68</sup> See e.g. Brownlie, *System*, pp. 40–44.

for the breach of international obligations. The subtlety of this doctrine is that it appears to bring international law into line with the most advanced systems of municipal law. In fact, this means overlooking the completely different structure of international law. In this type of legal system, a device which, in municipal law, serves to protect the individual is transformed into a bastion of irresponsibility.<sup>69</sup>

The proof of subjective elements is notoriously difficult in international practice, dealing mainly with States.

- (iv) The abandonment of the notion of ‘crimes of States’ rendered even less urgent the element of fault. Had the crimes been maintained, some subjective element would probably have been implicit in the very notion of some of them, and thus the *culpa* doctrine could not have been completely ousted from the law of State responsibility.<sup>70</sup> Since the crimes of State were transformed into breaches of preemptory norms, the issue of fault could more easily be shifted to the primary rules.

The foregoing does not, however, mean that the element of fault is irrelevant in the law of State responsibility. Thus, for example, the presence of fault may be relevant for fixing the quantum of the compensation due.<sup>71</sup>

## 11. UNITARY NATURE OF STATE RESPONSIBILITY WITH REGARD TO THE SOURCES OF OBLIGATIONS

There is only one single regime of State responsibility with the elements we have discussed in Section 10. This means that there is no distinction made according to the source from which the obligation breached

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<sup>69</sup> G. Schwarzenberger, *International Law – As Applied by International Courts and Tribunals*, vol. I, London, 1957, p. 648.

<sup>70</sup> Crawford, *State*, p. 61.

<sup>71</sup> Article 39 ASR: ‘In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State ...’. See Crawford, *ILC’s*, pp. 240–241. The same is obviously true if the wrongdoing State has acted negligently or wilfully, under article 36 ASR and related international practice. See Brownlie, *System*, p. 46. For compensation, see below, Chapter 5, Section 2.

stems.<sup>72</sup> In particular, international law does not know the distinction between contractual and extra-contractual responsibility. This unity flows from the fact that the sources of international law are functionally equal, each stemming from some will or practice of States. In a horizontal society, there is no 'objective law' placed above 'subjective contractual legal acts'. Quite the contrary, the treaty often embodies rules which are genuinely legislative in nature. Hence, international practice shows that the consequences under State responsibility are the same whether the obligation breached flows from agreements, customary rules, general principles of law, unilateral undertakings, acquiescence and estoppels, or international judgments, and so on. The older practice in this regard is discussed by the ILC<sup>73</sup> while the newer leading case is the arbitral award in the *Rainbow Warrior* affair (1990).<sup>74</sup>

There clearly remains the fact that the regimes of international responsibility have split into many limbs:<sup>75</sup> civil and criminal responsibility; responsibility and liability for lawful activities; reparation and CM; etc. But this has nothing to do with the source of the obligation breached, i.e. with the origin of the rule at stake. It rather concerns a functional differentiation of the reach of responsibility in the manifold contexts in which it has become relevant in the modern world. It seems clear that the wheel will not now turn backwards.

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<sup>72</sup> Article 12 ASR. See Crawford, *ILC's*, pp. 125ff. See P. Reuter, 'Principes de droit international public', *RCADI*, vol. 103, 1961-II, pp. 584ff. Some doubts are expressed in C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', *RCADI*, vol. 281, 1999, pp. 272–273, in view of the great differences in the quality of the primary rules, ranging from soft duties of cooperation to aggression.

<sup>73</sup> R. Ago, Fifth Report, §§ 12ff.

<sup>74</sup> *RIAA*, vol. 20, p. 251, § 75. See also the *Gabcikovo-Nagymaros* case, ICJ, *Reports*, 1997, p. 38, § 47. On the whole issue, see Y. Nishimura, 'Source of the Obligation', in: Crawford, Pellet and Olleson, pp. 365ff.

<sup>75</sup> A. Pellet, 'The Definition of Responsibility in International Law', in: Crawford, Pellet and Olleson, pp. 11–12. Some years ago, it had been claimed that the significant extension of reach of responsibility and its inroads into direct and indirect injuries, lenient acts and grave crimes, civil and public components, simple injuries to aliens and complicated investment issues, etc. called for an urgent reassessment. See R. Y. Jennings, 'General Course on Principles of Public International Law', *RCADI*, vol. 121, 1967-II, p. 473.

## 12. SPECIAL LEGAL REGIMES OF RESPONSIBILITY

It is possible to adopt in some sources of particular international law special rules for the consequences of breach of international obligations. The secondary rules on State responsibility are not of a *jus cogens* character. They can thus be altered by agreement. Only the principle of responsibility itself cannot be contracted out;<sup>76</sup> and with it the duty to face the main legal consequences of breach (the claim for reparation can be waived, but only in concrete contexts and not in advance once and for all). The ASR makes provision for such situations of derogation from its general rules. Article 55 provides: ‘These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.’<sup>77</sup>

The general rules are displaced only to the precise extent the special regime derogates from them, unless the parties otherwise provide. The question to what extent there is a derogation is a matter of interpretation. The most frequent special regime concerns the limitation of the power to take CM in favour of some scheme of settlement of disputes.<sup>78</sup> The anarchic reach of CM is then tamed in favour of a multilateral regime. But even in these cases the law of CM is not fully ousted, as the admissibility of urgent CM to protect important rights or the issue of CM used to enforce awards which are not honoured show. Another example concerns regimes of joint and several responsibility: since the common international law regime is based on the responsibility of each State for its own acts and omissions, States engaging in a collective enterprise and wishing to establish collective responsibility ought to do so through a special treaty regime.

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<sup>76</sup> See G. Schwarzenberger, ‘The Fundamental Principles of International Law’, *RCADI*, vol. 87, 1955-I, p. 357, admitting that international law could not operate without the principle of responsibility.

<sup>77</sup> Crawford, *ILC’s*, pp. 306–308.

<sup>78</sup> See e.g. the World Trade Organization’s Dispute Settlement Understanding, 1994, UNTS, vol. 1867, pp. 3ff. The Inter-American Court of Human Rights has affirmed that the Inter-American Convention on Human Rights constitutes a *lex specialis* regarding State responsibility in view of its special nature as a human rights instrument: Case of the ‘Mapiripan Massacre’ v. Colombia, Judgment of 15 September 2005, § 107. However, the specificities mentioned by the Court are mainly situated in the primary rules applicable under the Convention or under its own case law (e.g. positive obligations of due diligence for the protection of populations).

There are other subject areas endowed with specific rules of responsibility. Thus, for example, in international humanitarian law the general rules of responsibility are normally applicable, but there are certain limited specificities due to special primary rules of this branch of the law.<sup>79</sup> Thus, the 'state of necessity' is not a circumstance precluding wrongfulness, just as the plea of 'self-defence' (*jus ad bellum*) is not. By the same token, reciprocity and reprisals against protected persons are severely limited or even outlawed. In other contexts, the general rule is followed but interpreted strictly: thus, there is a strict responsibility for members of the armed forces and thus a very narrow apprehension of possible excuses for *ultra vires* acts. This course reflects article 7 of the ASR. However, the line between private and public acts is drawn in favour of the latter and thus of responsibility. This is the case e.g. when members of the armed forces engage in rape. This act could be considered of a private nature in general international law. It will not be considered as such in the context of the law of armed conflicts responsibility.

Overall, the general rules of responsibility are in most cases flexible enough to accommodate special needs without the necessity to frame derogatory rules. In other words, the special wishes can be brought within the four corners of the general law, e.g. considering the multiple and malleable principles on the calculation of damages.<sup>80</sup>

### 13. THE CODIFICATION OF STATE RESPONSIBILITY BY THE ILC<sup>81</sup>

At the UNGA of 1953, Cuba submitted a draft resolution requesting the ILC to undertake with some priority the codification of the law of State responsibility. This wish was adopted in Resolution 799 (VIII) without any mention of priority being given. The resolution was adopted with 24 abstentions. In 1955, after having submitted a long memorandum in

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<sup>79</sup> M. Sassoli, A. Bouvier and A. Quintin, *How Does Law Protect in War?*, 3rd ed., vol. I, Geneva, 2011, pp. 391ff.

<sup>80</sup> See below, Chapter 5.

<sup>81</sup> On this history of the codification, see the short summaries in Crawford, *State*, pp. 35ff; A. Pellet, 'The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts', in: Crawford, Pellet and Olleson, pp. 75ff. On the whole codification process of State responsibility, see S. Rosenne, 'The Perplexities of Modern International Law, General Course on Public International Law', RCADI, vol. 291, 2001, pp. 382ff.

1954, F. V. Garcia Amador, from Cuba, was appointed as Special Rapporteur. The approach he followed was traditional: the issues were approached from the perspective of the proper treatment of aliens. The discussions turned out to be difficult. The matter quickly became entangled in the disputes on the primary rules applicable, i.e. in the dispute between the adherents of the 'international minimum standard of treatment' and the adherents of the 'national standard of treatment'.<sup>82</sup>

In 1961, R. Ago was appointed Special Rapporteur, after Garcia Amador had resigned from the Commission. R. Ago disentangled the issues of primary and secondary norms and proposed to concentrate on the latter, i.e. to draft a general law of responsibility and only of responsibility. R. Ago then submitted eight Reports (plus an Addendum) between 1969 and 1980. These reports represent the heyday of the modern law of responsibility. They were drafted by Ago with a distinctive so-called 'inductive approach', in collaboration with M. Spinedi. The apparent inductive approach permitted the Rapporteur to firmly root many conclusions in the existing practice and to render them acceptable to the community of States and to his fellow members of the Commission. At the same time, the fine legal distinctions and the spontaneous feeling of the needs of the community of States then existing, as perceived by Ago, and also his sensitive political antennae, allowed him to go further than simply stating facts and rules. He indicated preferences and developed the law, as is visible, for example, with the notion of 'international crimes of States' under the then Article 19 of the Draft.<sup>83</sup> Thus, it is only apparently contradictory to say that Ago was at once an inductive 'positivist' and an adept at spontaneous natural law, not deduced from principles, but rather perceived in the reality and values of the international community as it stood in its time. The general rules of State responsibility were uncovered and codified in this rich formative phase.

Between 1980 and 1986 the Special Rapporteur was W. Riphagen from the Netherlands. The task ahead was now to refine certain concepts and to tackle the consequences of responsibility. Riphagen did not have a lasting impact on the project, though he carried it on adequately. His reports proved to be too heavily theoretical. Then followed the Special Rapporteur G. Arangio-Ruiz from Italy, between 1988 and 1996. The work progressed now towards a full set of articles. Arangio-Ruiz was a

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<sup>82</sup> On these standards, see H. Dickerson, 'Minimum Standards', in: *Max Planck Encyclopedia of Public International Law*, vol. VII, Oxford, 2012, pp. 235ff.

<sup>83</sup> On the crimes, see *Fifth Report*, §§ 72ff.

man of firm convictions. He struggled in particular to uphold the notions of ‘international crimes’ (against growing resistance from some States and in the Commission itself). He also wanted to impose a fully fledged system of dispute settlement with an obligatory conciliation mechanism in all disputes relating to responsibility issues and even mandatory arbitration for all disputes involving unilateral CM. The latter would have imposed some sort of quasi-universal obligation of arbitration on the basis of the simple fact that a State had taken CM; and the taking of such measures could therefore trigger the obligation of the other State to submit to arbitration. In other words, the taking of CM would automatically trigger the jurisdiction of a tribunal. At the same time, the reports by Arangio-Ruiz are legally dense and remarkably subtle. In 1996, the last Special Rapporteur was nominated, the UK-based Australian professor of International Law, J. Crawford. Acting from 1996 to 2001, he wrapped up the whole project and sought to bring the efforts of the ILC on this subject matter to a close by pragmatically solving the outstanding issues. There were actually three open questions: crimes of State, CM and settlement of dispute mechanisms. Crimes of State were deleted and replaced by ‘serious breaches of peremptory norms’ under articles 40–41 of the ASR. The law of CM was drafted with the aim of restricting these measures by a series of legal requirements rather than leaving them unregulated and thus in a legal ‘limbo’; the link with obligatory arbitration was severed. Lastly, the regime of dispute settlement was abandoned, since this is not a matter of responsibility. The general rules on the settlement of disputes are applicable. Thus, for example, the ICJ will be competent to hear a dispute on responsibility between States if there is a title of jurisdiction, under article 36, § 1 or § 2, of the ICJ Statute. The Vienna Convention on the Law of Treaties of 1969 has shown, among many other conventions,<sup>84</sup> that the provisions on the settlement of disputes contained in such conventions are not often followed in practice – at least unless there is some tribunal with mandatory jurisdiction, as with the European Convention on Human Rights (ECHR).

A list of the various reports by the many special rapporteurs follows the Bibliography. Overall, a momentous work was brought to an end in 2001, when the UNGA adopted the draft of the Commission in a

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<sup>84</sup> For the Vienna Convention of 1978 on Succession of States in respect of Treaties, see R. Kolb, ‘Règlement des différends’, in: G. Distefano, G. Gaggioli and A. Hêche (eds), *La Convention de Vienne de 1978 sur la succession d’Etats en matière de traités, Commentaire article par article et études thématiques*, vol. 2, Brussels, 2016, pp. 1359ff.

resolution.<sup>85</sup> There is no immediate prospect that the ASR will be transformed into a convention. The main reason is that the perspectives of the carefully balanced articles are uncertain in a conference of States. The equilibrium found by the ILC after decades of work could be upset by bargaining stakes, political vagaries could creep in, and the convention, once adopted, could be poorly ratified. In view of such dangers, it has been considered better, in the unstable years we are living in, to leave the ASR as they are and to have them recommended by the UNGA. The ASR can then be extensively used and quoted in international practice and the jurisprudence of national and international tribunals.

## 14. DIGGING DEEPER

### A. The Alabama Arbitration<sup>86</sup>

It has been said above that the law of international responsibility was progressively consolidated in the 19th century through a series of arbitrations. One of the most famous among them is the *Alabama* case decided in Geneva in 1872, in a stylish room of the Hôtel de Ville still called ‘Alabama room’ and open to visits by guests. The dispute arose from claims made by the US against the UK stemming from the American Civil War (1861–1865). Following the blockade of the ports of the seceding Southern States by President Lincoln, the Confederate States sought to buy and arm ships in Europe which could break the blockade and provide supplies to the secessionists, and also capture or sink enemy ships. Important ships were set up and armed in the UK under disguise, so as to avoid diplomatic turmoil. One of these ships, the *Enrica*, sailed from Liverpool to the Azores where it received its crew and ammunitions. It was now called the *Alabama* and managed to sink or burn 64 US vessels before it was itself destroyed in June 1864. The UK government had recognized the Southern States as belligerents and

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<sup>85</sup> Resolution 56/83, 2001.

<sup>86</sup> On this arbitration, see the short accounts in: T. Bingham, ‘Alabama Arbitration’, in: *Max Planck Encyclopedia of Public International Law*, vol. I, Oxford, 2012, pp. 272–275; N. Politis, *La justice internationale*, Paris, 1924, pp. 36ff. For a fully fledged treatment of the issues, see T. W. Balch, *The Alabama Arbitration*, Philadelphia, 1900; A. Cook, *The Alabama Claims*, Ithaca, 1975. For the text of the arbitral award, see J. B. Moore, *History and Digest of the International Arbitrations to which the US has been a Party*, vol. I, Washington DC, 1898, pp. 495ff.

proclaimed its neutrality. Under the applicable internal law of the UK, it was in such cases unlawful to equip or arm vessels to be used by foreign belligerents in hostilities against a friendly State (but it was not clear whether the relevant provisions also applied to the building of vessels not equipped in the UK itself).

After the end of the war, a series of claims were brought forward by the US against the UK concerning those vessels that had sailed from the latter's territory, including the *Alabama*. After a phase where no agreement could be found, an agreement was concluded in 1871 (Treaty of Washington). It provided that the claims would be arbitrated. The tribunal should be composed of five arbitrators, who would convene in Geneva and decide by majority. Most importantly, the Treaty of Washington set up the rules of responsibility under which the claims should be judged (this was a *lex specialis*). These so-called Three Washington Rules were epochal. They were contained in Article VI of the Treaty:

(i) First, [the neutral government is bound] to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to war-like use; (ii) Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men; (iii) Thirdly, to exercise due diligence in its own ports and waters and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

With these three rules, which had given rise to fierce negotiations, the UK had in fact accepted its defeat on the main claims. Once the Tribunal was constituted, there was a procedural incident on the claims for indirect losses, on which the US insisted while the UK thought that they had been implicitly abandoned. The incident was closed by the Tribunal preliminarily deciding that these claims could not be compensated; the UK had won on this point and the US renounced this part of its claims. On the merits, the UK was condemned unanimously on the *Alabama* claims and by one dissent for the *Florida* claims, while the other claims were dismissed. The award against the UK was for a considerable sum (US\$ 15,500,000 in gold); it was entirely honoured by the UK.

The lasting value of this arbitration is to be seen on two planes. First, it provided a great impetus to the movement in favour of international

arbitration of disputes. Second, it was one of the first great modern awards concerned mainly with responsibility issues to be solved according to the law. Substantively it was the starting point for the international law duties of prevention ('due diligence'), which became so important in the course of the 20th century. Finally, it should be noted that it is hardly an accident that this great case of the 19th century was concerned with issues of responsibility in the context of the law of neutrality in sea warfare. This was one of the most important and sensitive areas of international law of the day. The sea was still the essential space for supplies and raw materials. The maintenance or cut-off of these lines of communication was a crucial matter during war.

### **B. Issues of Responsibility under Classical International Law**

As has been explained, the 19th-century international legal system had not developed a fully fledged system of State responsibility. The issue of redress for unlawful acts was intermingled with the question of settlement of disputes: if a claim for responsibility arose, it could be settled by agreement (i.e. through diplomacy); if no agreement could be found, the aggrieved State was entitled to have recourse to forcible measures short of war (notably reprisals) and ultimately to declare war in order to vindicate its rights. The following passage of an old textbook gives a short but very clear account of this state of affairs:<sup>87</sup>

When a conflict of international rights arises, as is the case whenever one state has a cause of difference with another, it is customary for the state whose rights have been denied, or trespassed upon, to make known its cause of complaint to the offending state, and to demand that justice be done for the wrong that has been committed. ... Those [the methods of adjustment] most frequently resorted to are: (a.) an amicable adjustment of the difference by the interested states; (b.) mediation; (c.) arbitration.<sup>88</sup> ... Between the peaceable methods of adjusting international disputes ... and an actual resort to force, lie certain measures of redress of a more serious character. These methods presume the existence of a cause of difference between two states, justifying a departure from the normal relations existing between the nations in time of peace, and the measures adopted at times involve the use of violence or force; but, even when exercised to an extreme degree, they fall short of open or public war. They are resorted to only when redress has been asked for and denied, and are justifiable only when the offending nation acts with full knowledge, and persists in doing injustice even after its attention has been

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<sup>87</sup> G. B. Davis, *The Elements of International Law*, New York/London, 1900, pp. 250ff.

<sup>88</sup> *Ibid.*, p. 250.

repeatedly drawn to its wrongful acts. The measures of redress involving the use of forcible or hostile methods are susceptible of classification under one of the two heads – retorsion and reprisals.<sup>89</sup> ... As there is no superior authority to which a state can appeal for redress when any of its sovereign rights have been trespassed upon, denied, or impeded in their exercise, it is compelled, as a last resort, to redress its own injury or wrong. This it does by a suspension of all friendly relations with the offending state, and by a resort to such acts of hostility as are authorized by the laws of war.<sup>90</sup>

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<sup>89</sup> *Ibid.*, p. 263.

<sup>90</sup> *Ibid.*, p. 271.